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No. 99-

IN THE

Supreme Court of the United States

BLACKFEET NATIONAL BANK AND
AMERICAN DEPOSIT CORP.,
Petitioners,

v.

BILL NELSON, as Treasurer and Insurance
Commissioner of the State of Florida,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Office of the Comptroller of the Currency ("OCC"), the expert agency charged with administration of the National Bank Act and the regulation of national banks, determined in a reasoned opinion that a certain banking practice is within the authority of national banks under the express powers set forth in the Act. Under *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court can reject an agency's interpretation of the statute it administers only if it determines that the agency's interpretation is not "reasonable in light of the statute's revealed design." Did the court err in concluding that the National Bank Act "may not be interpreted to permit" the practice in question, and that the OCC's interpretation was "an unreasonable expansion of the powers of the national banks beyond those intended by Congress," without examining the OCC's explanation of its decision and its reasoning, or the history and overall policy of the National Bank Act? In ascertaining whether an agency's interpretation is "reasonable in light of the statute's revealed design" under *Chevron*, must a court review both the agency's reasoning and the statute, and consider how the interpretation fits into the context of the regulatory scheme as an organic whole?

2. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12, provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, ... unless such Act specifically relates to the business of insurance." 15 U.S.C. §

1012(b). Did the court of appeals err in refusing to recognize, in square conflict with the Eighth Circuit in *First Nat'l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990), that in enacting the McCarran-Ferguson Act Congress did not intend the "business of insurance" to encompass lawful activities of national banks?

3. Did the court of appeals err in holding, contrary to this Court's opinion in *NationsBank v. Variable Annuity Life Ins. Co.* 513 U.S. 251 (1995), that the McCarran-Ferguson Act permits a state, under the guise of "regulating the business of insurance," to prevent a national bank from exercising a power to issue annuity contracts that the federal regulatory authorities have recognized is expressly conferred on the bank by the National Bank Act of 1864?

PARTIES TO THE PROCEEDING

The names of all parties appear in the caption of the case. Neither petitioner has a parent or subsidiary.

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PETITION FOR A WRIT OF CERTIORARI

Blackfeet National Bank and American Deposit Corp. respectfully petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this proceeding.

I. CITATIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

The case in the court of appeals is reported at 171 F.3d 1237 (11th Cir. 1999), and is reprinted at Appendix ("App.") A. The district court issued two opinions, both unreported (App. B and C.). The opinion of the court of appeals was issued on April 5, 1999. On June 3, 1999, petitioners were granted an extension of time to August 16, 1999, to file this petition. Application No. A-1017. This Court has jurisdiction under 28 U.S.C. § 1254.

The case chiefly involves certain sections of the National Bank Act, 12 U.S.C. Chapter 2, especially 12 U.S.C. § 24, and the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12. They are printed in App. F and G.

II. STATEMENT OF THE CASE

The court of first instance had jurisdiction of this case under 28 U.S.C. § 1331, in that it is an action arising under the laws of the United States, *viz.*, 42 U.S.C. § 1983.

Petitioner American Deposit Corp. ("ADC") owns, and licenses to petitioner Blackfeet National Bank ("Blackfeet"), a proprietary banking product called the "Retirement CD." To oversimplify, the Retirement CD is a certificate of deposit under which the bank undertakes to allow the depositor to withdraw a fixed monthly amount for life after an agreed maturity date. The Office of the Comptroller of the Currency ("OCC"), the agency with regulatory authority over national banks, has determined that national banks have authority to issue the Retirement CD pursuant to their express powers under the National Bank Act. In addition, the Federal Deposit Insurance Corporation has ruled that the Retirement CD is a "deposit" under its governing statute, insurable by the FDIC (within the statutory maximum) to the extent of its maturity amount. App. 103a-104a.

National banks are federal instrumentalities created pursuant to the National Bank Act 12 U.S.C. Chapter 2, which since its enactment in 1864 to aid in financing the Civil War has been the bedrock foundation of the American banking system. They are thus not normally subject to state regulation. In this case, however, respondent, the state insurance commissioner of Florida, claims that he can regulate or forbid the offering of the Retirement CD by Blackfeet to Florida residents. He bases his claim on the proposition that the Retirement CD is an "annuity," that annuities are "insurance" subject to his regulatory authority; and that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-12, overrides the National Bank Act by providing that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

Blackfeet and ADC challenged respondent's assertion of authority as an interference with their federally secured rights under the National Bank Act, under 42 U.S.C. § 1983. Suit was originally filed in the District of Montana, Blackfeet's home district, and transferred to the Northern District of Florida under 28 U.S.C. § 1404. The latter court issued two opinions. App. B and C. It accepted the OCC's determination that the Retirement CD was an authorized national bank activity, but held that the Retirement CD, as an "annuity," was "insurance" within the meaning of the McCarran-Ferguson Act and hence could be regulated by Florida. The court of appeals reversed the district court on the former ground, rejecting the OCC's interpretation of its own statute and holding that the Retirement CD was not authorized by the National Bank Act; and affirmed the district court's holding that the McCarran-Ferguson Act permitted Florida to regulate it.

III. REASONS FOR ALLOWANCE OF THE WRIT

This Court's guidance is needed.

First. The case presents an important issue in the application of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the delicate question of the court's deference to an administrative agency's interpretation of its statute and the circumstances under which a court can hold and agency's interpretation to be unreasonable, and affords an opportunity to guide the lower courts in that regard.

A court has two different problems in *Chevron* analysis. The first is the question whether analysis under *Chevron* must be performed at all. The second is how it should be performed. This Court addressed the first question last Term in *United States v. Haggar Apparel Co.*, 119 S.Ct. 1392 (1999). The instant case presents the second question.

Before rejecting an agency's interpretation of its statute, *Chevron* requires that a court determine that the that the interpretation is "unreasonable" in light of the statute's "revealed design." The court below held the OCC's interpretation of the National Bank Act unreasonable without any analysis of the agency's reasoning, without any review of the history and policy of the statute, and based its decision purely on its own view of the policy underlying a single unrelated out-of -context section of the statute.

The Court should make it clear to the lower courts that this will not do; that under *Chevron* a court is not free to refuse deference to an expert agency's interpretation of its statute without analyzing the agency's reasoning in light of consideration of the statute and its history and policy as an organic whole.

Second. Recognizing the Retirement CD as an authorized practice of a national bank leads to the second issue: Does McCarran-Ferguson apply to the National Bank Act, or is that Act one of those statutes whose paramount federal importance forecloses McCarran-Ferguson reverse preemption? The answer should be clear. Congress cannot conceivably have intended to subject the national banking system, the central pillar of the national financial structure, to the whims of 50 state insurance commissioners. The Eighth Circuit has so held, contrary to the Seventh Circuit and the court below; and the Court in this case should resolve this split and reaffirm the paramount national interest in the national banking system.

Third. Even if McCarran-Ferguson were applicable, the court below erred in its interpretation, misapplying certain tests articulated by this Court in *Union Labor Life Ins. v. Pireno*, 458 U.S. 119 (1982), in a situation for which it was never intended, and misinterpreting Justice Ginsburg's opinion for this Court in *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 231 (1995). These misinterpretations should be clarified.

A. The Decision Below

Under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as explicated with specific reference to the OCC's interpretation of the National Bank Act in *NationsBank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995), where the expert agency to whom Congress has confided the administration of a statute has expounded the statute, and Congress has not expressed a clear intent as to the precise question at issue and the statute is silent or ambiguous as to that issue, then, "if the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, [this Court] give[s] the administrator's judgment 'controlling weight'" *NationsBank*, 513 U.S. at 257.

The "administrator's reading" in the instant case was a careful and meticulous analysis of whether the Retirement CD fell within the powers of national banks set forth in the governing statutes, including the power to receive and accept deposits, 12 U.S.C. § 24

(Seventh), the power to enter into contracts under 12 U.S.C. § 24 (Third), and the general power to enter into liabilities and fund its operations. The ruling emphasized that "the business of banking" is not confined to the five specific powers enumerated in § 24 (Third) (a position which this Court subsequently affirmed in *NationsBank*, 513 U.S. at 258 n.2). It pointed to Congress' language in repealing in 1982 the statutory limitation on national bank borrowings as "evidenc[ing] a clear recognition on the part of Congress that to remain competitive, national banks must be able to fund their operations without unwarranted restraints." App. 78a. "The inherent relationship that the Retirement CD customer has with the Bank is that of depositor or creditor," it pointed out. App. 79a. "The customer places funds with the Bank and in turn receives the Bank's promise to repay the amount it has received, plus interest. This promise forms the very basis of the depositor or creditor/bank relationship." App 79a. In short, said the OCC, "[t]he product represents the very essence of banking. . . ." App. 81a.

The OCC addressed with care the question whether the fact that the product was "structured to provide for interest payments keyed in part to the expected life of the depositor" changed its "intrinsic nature," App. 79a, and concluded that it did not, after careful analysis based on its expertise and experience. "Modernizing bank practices to comport with ever changing customer needs is permissible," it said, "provided that the practices remain fundamentally what is authorized by the Act. In addition, utilizing creative funding techniques is a desirable, indeed necessary action for national banks." App. 79a-80a. It pointed to *M&M Leasing Corporation v. Seattle-First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (national banks may engage in the leasing of motor vehicles), in which the court observed that the National Bank Act did not freeze the practices of national banks in their nineteenth century forms," and added "we believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." It pointed also to *American Insurance Association v. Clarke*, 656 F. Supp. 404 (D.D.C. 1987), *aff'd*, 865 F.2d 278 (D.C. Cir. 1988) (national banks may issue municipal bond insurance), in which the court rejected "a narrow and artificially rigid view of both the business of banking and the statute that governs that business." App. 81a. It analyzed the return to be received by the depositor as being a form of interest — compensation for the use of money — noting that national banks in recent years had "responded to changing customer needs and market forces by offering a range of innovative bank deposit related instruments" such as CDs whose interest was based on the S&P 500 or on fluctuations in college tuition costs. "Much like the proliferation of IRA accounts and other related deferred compensation products," the OCC concluded, "the Retirement CD is merely a reaction by the Bank as part of its business to create a specially structured bank product intended to meet customer financial needs, with an emphasis on those related to retirement". App. 88a.

Interestingly, the OCC addressed the decision of the Fifth Circuit in the *NationsBank* case (which at that time had not yet reached this Court) and rejected its reasoning in substantially the same terms as this Court would employ the following year. App. 82a-83a.

The OCC's ruling thus reflected a careful analysis of the Retirement CD, grounded in its banking expertise and 130 years of experience with the national banking system and the activities of banks.

The court of appeals disregarded this expertise and substituted its own banking "expertise." It conspicuously failed to analyze the "revealed design" of the regulatory system established by the National Bank Act, as related to the Retirement CD. It said that "the primary purpose of state regulation of insurance — at least arguably — is the prevention of insolvency." 171 F.3d at 1242, App. 11a. It picked out the Glass-Steagall Act, the provision of 12 U.S.C. §24 (Seventh) which expressly forbids banks to underwrite stock issues, and reasoned that if banks cannot underwrite stock they must also not be able to issue annuities.[1]

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[1] The court managed to conflate the two concepts by referring to "underwriting" of annuities. This is a terminological confusion. Annuities are not underwritten, they are issued. Indeed, the term "underwriting" does not mean the same thing even with respect to securities and insurance. "Underwriting" a

Refusing thus to accord deference to the OCC's banking expertise, the court held the Retirement CD not to be an authorized national bank activity and thus to be subject to state regulation by Florida.

As a second ground for its decision, treating the Retirement CD as in effect an annuity contract, the court of appeals held that the "business of insurance" under the McCarran-Ferguson Act includes the issuance of such contracts, so that the "reverse preemption" of the McCarran-Ferguson Act permitted Florida to regulate or prohibit a national bank's issuance of the Retirement CD notwithstanding the normal principle that a state may not regulate the banking activities of a national bank.

To reach this conclusion, the court dealt first with the question whether McCarran-Ferguson applied to the National Bank Act at all, in light of the principle that "federal laws of paramount national importance" are exempt from McCarran-Ferguson reverse preemption notwithstanding the sweeping language of the Act. *E.g., Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F. 3d 1226, 1231 (2d Cir. 1995) (Foreign Sovereign Immunities Act); *First Nat'l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990) (National Bank Act); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d

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security means guaranteeing its sale. "Underwriting" in insurance parlance means evaluating the risk and determining the appropriate premium.

Cir. 1982), *vacated,* 463 U.S. 1223 (1983), *reinstated as modified* 735 F.2d 23 (2d Cir. 1984) (Title VII of Civil Rights Act of 1964). However, it brushed off the National Bank Act as "a strictly domestic set of purely economic regulations [which] does not reflect the same degree of national concern as FSIA or Title VII." Further, it noted that in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996), which held that § 92 of the National Bank Act specifically relates to the business of insurance, this Court did not address that question; from which the court of appeals inferred that *Barnett* stands for the proposition that McCarran-Ferguson does apply to the National Bank Act. 171 F.3d at 1244 n.10, App. 16a. The court did not refer to the Eighth Circuit's decision on this point in *First Nat'l Bank of Eastern Arkansas v. Taylor, supra,* at all (though that case had been cited to it), nor show any recognition of the fact that its decision on this point was squarely contrary to that of the Eighth Circuit in *Taylor*.

Having concluded that McCarran-Ferguson applies, the court of appeals employed the three-part test which this Court articulated in *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982), for determining whether an ancillary activity of an insurance company constitutes "the business of insurance," *viz.*, whether the activity has the effect of transferring or spreading a policyholder's risk, whether the activity is an integral part of the policy relationship between the insurer and the insured, and whether the activity is limited to entities within the insurance industry. Saying "[w]e frankly do not see the difference between insuring against living too long (which in essence is what this Retirement CD provides for) and insuring against dying too soon," the court held that Blackfeet assumes this risk for the policyholder [sic]" so that the Retirement CD transfers or spreads a risk within the first prong of *Pireno*. 171 F.3d at 1247, App. 22a-23a. Since the Retirement CD was the contractual relationship between the bank and its customer, it was "an integral part of the policy [sic] relationship between the insurer [sic] and the insured [sic]." As to whether the activity is limited to entities within the insurance industry, the court of appeals brushed aside the fact that "thousands of gift annuities are issued each year by charitable organizations" on the basis that a *Barron's* article reported that "nearly all of the $1 trillion worth of annuities currently in effect in the United States are issued by regulated insurance companies." 171 F.3d at 1247, App. 24a. Describing "the practice being scrutinized here" as "underwriting insurance products by banks," the court noted that it had "found no commercial examples where any entity other than an insurance company has underwritten [sic] this type of product (meaning a product similar to a fixed-rate annuity)." 171 F.3d at 1247-48, App. 25a. Holding finally that the National Bank Act does not "specifically relate to the business of insurance," 171 F.3d at 1248—49, the court held that McCarran-Ferguson permitted Florida to regulate the Retirement CD.

B. This Case Affords an Opportunity To Give Guidance to the Lower Courts With Respect to Their Implementation of the *Chevron* Doctrine

Just last Term, in *United States. v. Haggard Apparel Co.,* 119 S.C. 1392 (1999), this Court reaffirmed the broad applicability of the *Chevron* doctrine and provided the lower courts with much-needed guidance as to when *Chevron* analysis is called for. It made it clear that "[a] statute may be ambiguous, for purposes of the *Chevron* doctrine, without being inartful or deficient," and that "[f]or purposes of the *Chevron* analysis, the statute is ambiguous [when] the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms." 119 S. Ct. at 1400. In *Haggard* the court of appeals had erroneously determined that *Chevron* did not apply to the regulation there involved at all; and hence it engaged in no *Chevron* analysis. Concluding that "how the regulation at issue fares under the *Chevron* framework [was] best addressed in the first instance by the court of appeals, this Court remanded the case for such analysis to be conducted. 119 S. Ct. at 1401.

In *Haggard,* this Court thus clarified the question of when it is necessary to conduct a *Chevron* analysis; but it did not deal with the question of how it should be conducted. In the instant case, in contrast to *Haggard,* the court of appeals engaged in *Chveron* analysis, but its analysis was flawed. We respectfully suggest that this case offers an opportunity to supplement *Haggard* with equally much-needed guidance to the lower courts as to the principles governing determination whether an "administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design."

Specifically, how should a court go about determining "the legislature's revealed design" as related to a particular agency interpretation? In the present case, the court engaged in no in-depth analysis of the history and policy of the National Bank Act. Focusing on state insurance regulation as being designed to prevent insolvency of issuing companies, it seemed wholly ignorant of the fundamental responsibility of the OCC for preventing the insolvency of national banks and its extensive powers to examine national banks and take steps for the very purpose of preventing their insolvency. *E.g.*, 12 U.S.C. §§ 27, 93, 93a, 191, 203, 210, 211, 1818, 1821. (Curiously, the court quoted from its own subsequently-reversed opinion in *Barnett Bank, supra*, in this connection. 171 F.3d at 1243, App. 12a, 14a.)

The court of appeals made no effort to meet the OCC's discussion of "modernizing bank practices to comport with ever changing customer needs" and "utilizing creative funding techniques [as] a desirable, indeed necessary action for national banks," nor the OCC's analysis of various forms of interest as compensation for the use of money.

Indeed, it gave little evidence of having examined the National Bank Act in depth in search of Its "revealed design," or of having analyzed the OCC's ruling at all. Instead, its eye lit upon the Glass-Steagall Act, the provision of 12 U.S.C. § 24 (Seventh) which expressly forbids banks to underwrite stock issues, and it jumped to the conclusion that if banks cannot underwrite stock they must also not be able to "underwrite," *i.e.* issue annuities. It reasoned that because the Retirement CD shares with the underwriting of securities "the fundamental feature of guarantying payment of proceeds," thus "placing [the bank's] customers' assets at risk," therefore "it seems unreasonable to interpret the Bank Act impliedly to permit underwriting [sic] in one instance (Retirement CD) while expressly prohibiting it in another (securities)." 171 F.3d at 1243-247, App. 14a-15a. (emphasis original).

Under the doctrine of *expressio unius*, the normal inference would be that if Glass-Steagall had meant to forbid the issuance of annuities as well as the underwriting of stock it would have said so. Be that as it may, the court showed no awareness of the elementary fact of banking, that every interest-bearing deposit contains "the fundamental feature of guarantying payment of proceeds." For example, a one-year CD at 6% guarantees payment of proceeds, and places the bank's assets at risk that interest rates may fall and the bank take a loss on the transaction.

We submit that a court must do more than what the court did here in order to justify rejecting an interpretation of a regulatory statute by the agency to whose expertise Congress has confided its administration. It should familiarize itself with the entire statute and the history, purpose, and structure of the regulatory scheme which it erects. It should analyze the agency's determination point by point, and consider how that determination and its reasoning fit into the context of the regulatory scheme as an organic whole — its "revealed design." Only after such a careful analysis can it determine whether the agency's interpretation of the statute it administers is "reasonable in light of the statute's revealed design, " and only on the basis of such an analysis should it refuse to accord "controlling weight" to the agency's determination.

Here, the court of appeals conducted no such analysis and simply extrapolated from a single subsection of the statute that happened to catch its eye. Expert agencies are entitled to more consideration than that, and this case presents the opportunity to make that clear to the lower courts and to outline for them the elements of the analysis they should undertake.

C. This Court Should Settle the Conflict Between the Eighth Circuit on the One Hand, and the Seventh and Eleventh Circuits, as to Whether McCarran-Ferguson Reverse Preemption Applies to the National Bank Act.

As noted *supra*, the court of appeals recognized that there are some matters of such paramount importance to the national government and the federal system that it is simply inconceivable that Congress intended to turn them over to the states, and that accordingly there are some statutes which are simply not subject to McCarran-Ferguson reverse preemption notwithstanding the broad language of that Act. (For example, would the Congress that enacted McCarran-Ferguson in the spring of 1945 have thought it was allowing a state to authorize a domestic company to insure German and Japanese ships notwithstanding the Trading with the Enemy Act? Obviously not. The Legal Tender Act nowhere mentions insurance; could a state require that insurance premiums be paid only in gold and silver? Obviously not.) As already noted, the court cited *Stephens, supra,* which held McCarran-Ferguson inapplicable to the Foreign Sovereign Immunities Act), and *Spirt, supra*, which held similarly with respect to Title VII of Civil Rights Act of 1964. And, as already noted, the court conspicuously did not cite the aspect of *First Nat'l Bank of Eastern Arkansas, supra,* which held that the National Bank Act falls into this category and rejected the notion that Congress could have intended that an activity falling within the powers granted by the National Bank Act would constitute the "business of insurance" under the McCarran-Ferguson Act. Contrary to the Eighth Circuit, the court below, as noted, brushed aside the National Bank Act, saying that "as a strictly domestic set of purely economic regulations, [it] does not reflect the same degree of national concern as FSIA or Title VII." 171 F.3d at 1244 n.10, App. 16a-17a.

This is an extraordinary statement. Enacted to help finance the Civil War and bring the nation out of the chaotic system of state banks that had prevailed since President Andrew Jackson's "bank war" killed the Bank of the United States, the National Bank Act, together with the Federal Reserve Act, is one of the twin central pillars of the nation's entire monetary system and reflects resolution of a profound debate that raged for the first century of the Nation's existence. See generally HAMMOND, BANKS AND POLITICS IN AMERICA (1957) . It would come as a surprise to Alexander Hamilton, Salmon P. Chase, and Carter Glass to learn that a sound national financial system is somehow of less "national concern" than the status of foreign governments in American courts or an employment policy enacted a century after the Bank Act. Indeed, without the underpinning of a solid national financial system, there might well be no litigation with foreign governments or employment policy to worry about.

In addition, echoing the Seventh Circuit case of *American Deposit Corp. v. Schacht,* 84 F.3d 834 (7th

Cir.), *cert denied*, 117 S. Ct. 185 (1996), the court of appeals also pointed to this Court's decision in *Barnett Bank, supra*, as indicating that McCarran-Ferguson preempts the National Bank Act. In *Barnett*, the Court held that § 92 of the National Bank Act specifically refers to the business of insurance; hence McCarran-Ferguson would not preempt it in any event. That was an independent ground for decision and the broader question never seems to have been raised by the parties and was not considered by the Court.

Moreover, this Court's description in *Barnett* of the purpose of McCarran-Ferguson is instructive. That purpose, Justice Breyer said for the Court, was "to protect state regulation primarily against inadvertent federal intrusion--say, through enactment of a federal statute that describes an activity in broad, general terms, of which the insurance business happens to comprise one part." 517 U.S. at 39, 116 S.Ct. at 1112 (emphasis original). Unlike the Sherman Act, the unexpected application of which to the insurance business as a result of *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944), triggered passage of McCarran-Ferguson, the National Bank Act is not a broad regulation of commerce that was later found to have inadvertently impinged upon state regulation. It is not, in fact, a federal "regulation" of anything. It creates federally chartered banking corporations, subjects them to federal supervision to the exclusion of state "visitation," 12 U.S.C. § 484, and authorizes them to go about their business. There was nothing "inadvertent" or "unanticipated" about the National Bank Act. Congress knew exactly what it was doing: It was helping to finance the Civil War and put an end to the Balkanization of American banking among a myriad of state institutions, by affirmatively creating federal corporations for federal purposes--corporations the exercise of whose express powers "Congress would not want States to forbid, or to impair significantly." *Barnett*, 517 U.S. at 33, 116 S. Ct. at 1109. The Court's description in *Barnett* of the policy underlying McCarran-Ferguson in fact militates strongly against any notion that Mccarran-Ferquson can apply to the National Bank Act. This Court had no need to decide that point in *Barnett* and it was not raised in that case in any event. The reliance on *Barnett* by the court below was misplaced.

This case affords an opportunity to settle the split of authority between the court below and the Seventh Circuit, on the one hand, and the Eighth Circuit on the other, and in so doing to reaffirm the primary national interest in the national banking system.

D. The Decision of the Court of Appeals That the Issuance of Annuity Contracts Is "The Business of Insurance" Misapplies This Court's Decision in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), and Contradicts This Court's Decision in *NationsBank v. Variable Annuity Life Ins*, Co, 513 U.S. 251(1995)

Finally, the court of appeals held that by issuing the Retirement CD Blackfeet was engaged in the "business of insurance" and that accordingly McCarran-Ferguson reverse preemption applied and Florida could regulate it. As already noted, the threefold test of *Pireno* which the court employed was developed by this Court for determining whether an ancillary activity of an insurance company constitutes "the business of insurance." It presupposes an insurance company and an insurance policy and has never been applied by this Court where the question is whether a particular type of contract offered by a non-insurance entity is a contract of "insurance."

Moreover, the court's application of *Pireno* amounted to a determination that an annuity contract is a contract of "insurance." Although this is supported by the majority opinion of the Seventh Circuit in the *Schacht* case (and opposed by the long and scholarly dissent of Judge Flaum in that case), these two decisions are freakish in the extreme, for it is and always has been black-letter law that annuities are not insurance--and that was certainly the law in 1945 when McCarran-Ferguson was adopted. *E.g.*,1

APPLEMEN & APPLEMAN, INSURANCE LAW AND PRACTICE §84 (Rev. ed. 1981); COUCH ON INSURANCE 3D § 1:22 (Russ & Segalla ed. 1995); a sample of the innumerable cases is in the footnote.[2] It is thus wholly implausible that Congress in 1945 would have intended to include annuities in the "business of insurance."

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[2] A pre-1945 selection in historical order: *People v. Security Life Ins. & Annuity Co.*, 78 N.Y. 114, 128 (1879) ("These are not cases of insurance"); *Commonwealth v. Metropolitan Life Ins. Co.*, 254 Pa. 510, 98 A. 1072, 1073 (1916) ("A difference is recognized between the ordinary insurance contract and the granting of an annuity"); *In re Thornton's Estate*, 185 Minn. 351, 243 N.W. 389, 391 (1932) ("Decisions as well as statutes make a distinction between the two"); *Carroll v. Equitable Life Assur. Soc'y*, 9 F.Supp. 223, 224 (D. Mo. 1934) ("An examination of the authorities does not warrant the conclusion that an annuity contract is an insurance contract"); *Hall v. Metropolitan Life Assur. Soc'y*, 146 Ore. 32, 28 P.2d 875, 876 (1934) (The contract before us does not undertake to indemnify [the annuitant] or any one else against loss, damage, or liability arising from an unknown or contingent event whereby [the annuitant] suffers loss or injury"); *Rishel v. Pacific Mut. Life Ins. Co.*, 78 F.2d 881, 884 (10th Cir. 1935) ("In common parlance the word insurance does not embrace annuities"); *Daniel v. Life Ins. Co. of Virginia*, 102 S.W.2d 256, 257 (Tex. Civ. App. 1937) ("This has been the invariable holding wherever the subject has reached the courts for decision"); *State v. Equitable Life Assur. Soc'y*, 68 N.D. 641, 282 N.W. 411, 414 (1938) ("the cases which have considered the subject have uniformly recognized the distinction"); *Helvering v. Le Gierse*, 312 U.S. 531, 539, 541 (1941) ("annuity and insurance are opposites"); *Equitable Life Assurance Soc'y v. Johnson*, 127 P.2d 95, 99 (Calif App 1942); *Wolfe v. Breman*, 69 Ga. App. 813, 26 S.E. 2d 533, 637—38 (1943); *Gregg v. Commissioner*, 315 Mass 704, 54 N.E. 2d 169, 172-73 (1944) ("an insurance contract or policy is] an agreement by which one party for a consideration promises to pay money or its equivalent, or to do some act of value to the insured, upon the destruction, loss or injury of

Perhaps even more to the point, the determination of the court of appeals flies in the face of this Court's determination in *NationsBank* that annuities are not "insurance" within the meaning of the section of the National Banking Act, 12 U.S.C. §92, which impliedly forbids national banks in large towns from selling "insurance". This Court there quoted a leading treatise on annuities to the effect that "[a]nnuities ... are primarily investment products," and Appelman's great treatise on insurance law to the effect that "[a]nnuity contracts must ... be recognized as investments rather than insurance." 513 U.S. at 259. The court of appeals in this case attempted to sidestep

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something in which the assured or other party has an interest, as an indemnity therefor. That definition does not include annuity contracts"). A post-1945 selection: *Corporation Commission v. Equitable Life Assurance Soc'y,* 73 Ariz. 171, 239 P.2d 360, 363, 365 (1951) ("annuities are not policies or contracts of insurance); *Cruthers v. Neeld,* 14 N.J. 496, 103 A.2d 153, 157 (1954); *Security Life Assurance Soc'y. v. Barnes,* 494 P.2d 1294 (Colo. 1971); *Mercy v. Olsen,* 672 S.W. 2d 196 (Tenn. 1984) ("It is generally held that an annuity contract is not a contract of insurance"); *New York Ass'n of Life Underwriters v. New York Banking Dep't,* 83 N.Y.2d 353, 610 N.Y.s.2d 470, 632 N.E.2d 876, 881 (1994) ("the great weight of authority supports the position that annuities are not insurance."); *Texas Bankers Assoc. v. Bomer,* No. Civ.A.96CA694, 1997 U.S. Dist. Lexis 13422 (W.D. Tex. Aug. 7, 1997) (relying on the Flaum dissent in *Schacht supra*); *cf. Mathews v. Mathews* 336 Md. 241, 647 A.2d 812 (1994).

NationsBank by quoting a footnote from that case in which this Court pointed out that the bank in that case would "not have a principal stake in annuity contracts and therefore will incur no interest rate or actuarial risks," 513 U.S. at 260 n. 4. But this footnote does no more than point out what *NationsBank* was not deciding, and cannot be extrapolated to constitute a decision of a matter that was not before the Court.

The Court should take this opportunity to correct both this misapplication of the *Pireno* criteria, and this misreading of its decision in *NationsBank* with its singular misinterpretation of the term "insurance" in McCarran-Ferguson.

IV. CONCLUSION

This case provides an opportunity to give the lower courts guidance in the application of *Chevron*; to settle a clear split of authority among the circuits on the question of McCarran-Ferguson's application to the National Bank Act; and to correct misuse of the *Pireno* tests and misinterpretation of the decision in *NationsBank*. All are matters of major importance. The petition for certiorari should be granted.

Respectfully submitted,

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August 16, 1999	*Attorneys for Petitioners*

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.96-3021
D.C. Docket No. 94-40496-WS

BLACKFEET NATIONAL BANK,
AMERICAN DEPOSIT CORP,
Plaintiffs-counterdefendants-Appellants,

versus

BILL NELSON, as Treasurer and Insurance
Commissioner of the State of Florida,
Defendant-counterclaimant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

[Filed April 5th, 1999, Thomas K. Kahn, Clerk]

Before TJOFLAT, BIRCH and MARCUS*, Circuit Judges.

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*Honorable Stanley Marcus was a U.S. District Judge for the Southern District of Florida, sitting by designation as a member of this panel, when this appeal was argued and taken under submission. On November 24,1997, he took the oath of office as a United States Circuit Judge of the Eleventh Circuit.

TJOFLAT, Circuit Judge:

Blackfeet National Bank, a national bank located in the State of Montana, issues a product called the "Retirement CD" to the public. As part of its marketing efforts, Blackfeet has advertised these CDs in the Wall Street Journal. The Insurance Commissioner for the State of Florida, contending that offering the Retirement CD involves engaging in the business of insurance, commenced administrative proceedings against Blackfeet under the Florida Insurance Code. In response, Blackfeet sued the Insurance Commissioner, seeking a declaratory judgment that its sale of the Retirement CD was authorized by the National Bank Act (the "Bank Act"), 12 U.S.C. §§ 21-216d (1994). The district court, concluding that state regulation of the Retirement CD was permitted by the reverse preemption provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015(1994), rejected Blackfeet's position and granted the Insurance Commissioner summary judgment. We affirm.

I.

Blackfeet National Bank entered into a licensing agreement with American Deposit Corporation ("ADC") to obtain marketing rights to a new banking industry product, the Retirement CD. A customer desiring to purchase the Retirement CD makes an initial deposit with Blackfeet. At the time of the initial deposit, the customer chooses a maturity date. The customer also chooses a period, from one to five years, during which the interest rate for the Retirement CD remains fixed. Thereafter, until the maturity date, the interest rate fluctuates in accordance with the cost of finds (but never falling below three percent). The customer has the option to make limited additional deposits into the Retirement CD account prior to the maturity date.

Upon maturity, the customer may make a one-time withdrawal of up to two-thirds of the balance in the Retirement CD account. The balance remaining after this initial withdrawal is disbursed to the customer in equal periodic payments for the remainder of his life. Even in the event that the Retirement CD account reaches a zero balance, the customer continues to receive the same periodic payments until death. On the other hand, should the customer die before full payment of the principal in the Retirement CD account (as determined at the maturity date), the remainder of the principal is paid to the customer's estate. To minimize the mortality risk it assumes, Blackfeet determines the amount of the periodic payments to its customers by using actuarial tables.

Under its agreement with ADC, Blackfeet obtained a non-exclusive license to market the Retirement CD throughout the United States. As part of its marketing efforts, Blackfeet placed an advertisement for the

Retirement CD in the Wall Street Journal.[1] In response to this advertisement, Tom Gallagher,[2] the Insurance Commissioner of Florida (the "Commissioner"), began administrative proceedings against Blackfeet and ADC. The Commissioner maintained that the Retirement CD was in essence an insurance product, and that marketing it through the national media constituted participation in the business of insurance in Florida - in violation of Florida law. After the Commissioner commenced those proceedings, Blackfeet and ADC brought this suit.[3] Citing a letter from the Office of the Comptroller of the Currency (the "Comptroller") permitting (by not precluding) Blackfeet's issuance of the Retirement CD, Blackfeet and ADC urged the court to declare that the Commissioner lacked authority to regulate such issuance.[4] Concluding that the letter did not foreclose state regulation of the Retirement CD as insurance, the district court entered summary judgment for the Commissioner. Blackfeet and ADC (collectively "Blackfeet") then lodged this appeal.

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[1] This advertisement appears to be the only contact between Blackfeet and the State of Florida. There is no evidence in the record indicating that any citizen of Florida purchased a Retirement CD or otherwise responded to the advertisement.

[2] Gallagher also served as the Treasurer of Florida. He has since been replaced by Bill Nelson, who has therefore been substituted for Gallagher as the plaintiff-appellee in this case.

[3] Blackfeet and ADC sued the Commissioner in the United States District Court for the District of Montana. On the Commissioner's motion, that court transferred the case to the Northern District of Florida.

[4] The Comptroller filed a brief in this case as amicus curiae. Also filing briefs as amicus curiae were the American Bankers Association et al., the New York Clearing House Association, the

II.

The district court decided this case on the cross-motions of both parties for summary judgment. As the only issues in dispute involve questions of law, we review the district court's judgment *de novo. See Lasche v. George W. Lesche Basic Profit Sharing Plan* 111 F.3d 863 865 (11th Cir. 1997).

III.

Our analysis of this matter involves several inquiries. In part III. A, we address the reasonableness of the Comptroller's "no objection" letter with respect to Blackfeet's issuance of the Retirement CD. In part III. B, we assume arguendo that the Comptroller's determination was reasonable and examine the relationship between a federal law permitting the issuance of the Retirement CD by Blackfeet and a Florida law prohibiting the participation of banks in the business of insurance. We focus our attention in this part on the application of the McCarran-Ferguson Act, and in that regard we conduct a three-pronged inquiry. "(1) whether the pertinent sections of the [Florida Code] were enacted 'for the purpose of

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National Association of Life Underwriters, and the American Council of Life Insurance.

regulating the business of Insurance'; (2) whether the Retirement CD is properly considered 'the business of insurance'; and (3) whether the pertinent provisions of the Bank Act 'specifically relate to the business of Insurance.'" *American Deposit Corp. v. Schacht*, 84 F.3d 834, 838 (7th Cir. 1996).

A.

Blackfeet argued to the district court that it was authorized under the Bank Act to issue the Retirement CD. Blackfeet supported its argument with a determination by the Comptroller that issuance of the Retirement CD is an authorized bank activity. [5] The district court, accepting as reasonable the interpretation of the Comptroller, held that the Bank Act authorized Blackfeet's actions with respect to the issuance of the Retirement CD. We disagree.

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[5] Blackfeet also cited as support a letter from the Federal Deposit Insurance Corporation ("FDIC"), which concluded that the Retirement CD was a bank deposit that was fully insured (to $100,000) up to its maturity date, with the insurance thereafter limited to the amount of principal remaining in the Retirement CD (*i.e.*, as the amount of principal decreased through payments, the amount of insurance correspondingly decreased). Because the FDIC filly insures the Retirement CD through maturity, Blackfeet argues, it is properly characterized as a bank deposit. That argument, however, demonstrates a fundamental flaw in Blackfeet's reasoning. We cannot decide the nature of this instrument at its maturity date any more than a referee could decide the winner of a basketball game at halftime. We must also examine how the FDIC would treat the periodic payments after maturity. The FDIC has stated in its letter to Blackfeet that "[u]nder no circumstances would FDIC insurance extend to the bank's commitment to make lifetime payments, as the value of such payments is uncertain and may exceed the total account balance." Because the lifetime payment provision is the Retirement CD's "selling" feature, the fact that the FDIC will not insure those periodic payments demonstrates the differences between a bank deposit arid the Retirement CD - not the similarities.

Prior to placing its ad in the Wall Street Journal, Blackfeet notified the Comptroller of its intention to market the Retirement CD to the public. The Comptroller in turn sent Blackfeet what was in essence a "no objection"[6] letter, which in effect authorized Blackfeet to move forward with its plans. The Comptroller concluded that the Retirement CD was a financial product of the kind normally offered by banking institutions, and that its "primary attributes [were] grounded in the Bank's expressly authorized powers." According to the Comptroller, those powers included the power to receive deposits and enter into contracts, coupled with its powers to incur liabilities and fund its operations." 12 U.S.C. § 24 (Third), (Seventh) (1994).

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[6] Often, national banks will solicit guidance from the Comptroller as to whether a particular practice is permitted under the Bank Act. If there are no specific problems with the activity, the Comptroller may send the inquiring bank a "no objection" letter. This letter does not represent formal approval of the practice - only an assurance that the Comptroller would not challenge the bank's activity. The Comptroller may condition the "no objection" letter on the bank's commitment to address consumer protection concerns.

The Supreme Court has addressed the authority of the Comptroller to interpret and apply the provisions of the Bank Act. In *NationsBank of North Carolina N.A. v. Variable Annuity Life Insurance Co.*, 513 U.S. 251, 115 S. Ct. 810,130 L. Ed. 2d 740(1995), the Court reviewed the Comptroller's decision permitting banks to act as agents selling annuities for insurance companies. The Comptroller, as the chief administrator charged with the supervision of national banks, determined that the Bank Act authorized national banks to broker annuities. *See id.* at 254, 115 S. Ct. at 812. As part of this determination, the Comptroller concluded that annuities were not "insurance" within the meaning of section 13 [7] of the Bank Act, 38 Stat. 251,264(1913) (codified as amended at 12 U.S.C. § 92(1994)). *See id* at 255 115 S. Ct. at 812-13. Several insurance companies challenged this conclusion, arguing that annuities were insurance and that the Comptroller's interpretation that they were within the business of banking under the Bank Act was unreasonable.

In reaching its decision, the Court first discussed the proper inquiry for assessing the reasonableness of an administrative interpretation of a statute. *See id.* at 257,115 S. Ct. at 813. The first prong of the inquiry tests the intent of Congress; if Congress' intent is clear, "that is the end of the matter." *See id.* (citing *Chevron U.S.A.. Inc. v. Natural Resources Defense Council Inc.* 467 U.S. 837, 842, 104 S. Ct. 2778,2781, 81 L. Ed. 2d 694(1984))_If the statute is ambiguous, however, a second inquiry is required to test the reasonableness of the administrator's interpretation. *See id.* "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'" *Id.* at 257,115 S. Ct. at 813-14 (quoting *Chevron*, 467 U.S. at 844, 104 S. Ct. at 2782).

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[7] Section 13 provides that national banks located in towns with a population of 5000 or less may act as agents for insurance companies. See 12 U.S.C. § 92 (1994). That provision necessarily implies that these same banks are not authorized to act as agents for insurance companies if the banks are located in cities larger than 5000 in population.

Applying that two-part test to the facts, the *NationsBank* Court found first that the Bank Act permits activities beyond those enumerated in the statute (thereby making it ambiguous), and second that the Comptroller's interpretation of the statute as permitting banks to broker annuities for insurance companies was a reasonable interpretation deserving of the Court's due deference. In reaching this conclusion, the Court specifically accepted the Comptroller's view that "for the purpose at hand, annuities are properly classified as investments, not 'insurance.'" *Id.* at 261, 115 S. Ct. at 815. The Comptroller compared putting money in an annuity to putting money in a bank account or a mutual fund; they all answer financial needs in a way authorized by the Bank Act. Therefore, according to the Comptroller, the actions of *NationsBank* were permitted as an "'incidental powe[r] . . . necessary to carry on the business of banking.'"*Id.* at 260,115 S. Ct. at 815.

Blackfeet cites *NationsBank* in support of its argument that the Bank Act permits a national bank to market the Retirement CD.[8] The district court accepted Blackfeet's argument, concluding that the Comptroller's no objection letter offered a reasonable interpretation of the provisions of the Bank Act. The district court acknowledged that the Comptroller took into consideration the fact that payouts would be made based on actuarial tables. In fact, the Comptroller mandated procedures to mitigate the risks involved in such a payout structure. The court agreed with the Comptroller that the Retirement CD was in fact a "deposit," and that it "represent[ed] the very essence of banking which is embodied in a bank's express authority to accept deposits and enter into contracts, and authority to incur liabilities and fund its operation." The court therefore concluded that despite the risk shifting characteristics of the Retirement CD, its nature was that of a deposit and thus its issuance was within Blackfeet's powers under the Bank Act.

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[8] The Seventh Circuit has had occasion to address the very issue we face today. See *American Deposit Corp. v. Schacht*, 84 F.3d 834 (7th Cir. 1996). That court, however, declined to address whether the Bank Act authorized the issuance of the Retirement CD by a national bank when it considered the nature of the Retirement CD. Rather, it accepted for argument's sake that the Bank Act did authorize Blackfeet's actions, and proceeded with its analysis of whether an Illinois insurance regulation nevertheless trumped the Bank Act because of the reverse-preemption provisions of the McCarran-Ferguson Act. *See id.* at 837.

We reject this reasoning and conclude that the Comptroller's interpretation of the Bank Act is an unreasonable expansion of the powers of national banks beyond those intended by Congress. The district court's reliance on *NationsBank* is misplaced, as that case is limited by its facts. Of course, the *NationsBank* Court did conclude that annuities were not insurance "for the purpose at hand." *See NationsBank*, 513 U.S. at 261, 115 S. Ct. at 815. However, in *NationsBank*, the inquiry focused on the ability of a national bank to broker annuities; our case turns on the ability of national banks to underwrite the Retirement CD. In determining whether a national bank was authorized to market such a product, the Court as much as admitted the distinction we make today when it highlighted the Comptroller's assurance that "*NationsBank* 'will act only as agent [and] will not have a principal stake in annuity contracts and therefore will incur no interest rate or actuarial risks.'" *Id.* at 260 n.4, 1158. Ct. at 815 n.4. It is clear from the facts before us that Blackfeet will engage in underwriting the Retirement CD something the *NationsBank* Court implied would "deviate from traditional bank practices." *Id.*

Aside from this clear - and compelling factual distinction, there is a more basic and fundamental argument against the reasonableness of the Comptroller's interpretation. The primary purpose of state regulation of insurance at least arguably is the prevention of insolvency. *See First Nat'l Bank of E. Ark. v. Taylor*, 907 F.2d 775, 780 (8th Cir. 1990) ("'The prevention of insolvency and the maintenance of "sound" financial condition in terms of fixed dollar obligations is precisely what traditional state regulation [of insurance] is aimed at."' (*quoting SEC v. Variable Annuity Life Ins. Co. of Am.*, 359 U.S. 65,90-91,798. S. Ct. 618,631-32, 3 L. Ed. 2d 640 (1959) [hereinafter VALIC]). Underlying this concern over insolvency is the understanding that, for many reasons, the nature of insurance lends itself to the possibility of substantial abuse.[9] As a result, we have acknowledged the push for special regulation of the insurance industry, with the fundamental goal being "'the protection of solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders."' *Barnett Bank of Marion County. N.A. v. Gallagher*, 43 F.3d 631, 636 (11th Cir. 1995) (quoting *Barnett Bank of Marion County. NA. v. Gallagher*, 839 F. Supp. 835, 842 (M.D. Fla. 1993)), overruled on other grounds *sub. nom., Barnett Bank of Marion County. N.A. v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103, 134 L. Ed. 2d 237(1996).

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[9] Insurance involves risk shifting, whereby premiums paid by policy holders (along with interest from those premiums) are used to pay the claims of other policy holders. In essence, the provider pays present claims with proceeds from past and present premiums, while those who pay premiums now will have their future claims satisfied from the proceeds of future premiums. To insure solvency of the system, certain precautions must be taken by providers so that funds will be available to pay all submitted claims in the future. Should a provider redirect the premiums as part of a scheme of embezzlement, or even if the provider merely mismanages the present assets of the company, the future solvency of the system is in jeopardy.

It is exactly the risk shifting and use of actuarial tables present here in other words, the underwriting that necessitates the exclusion of the Retirement CD from the business of banking and its inclusion in the business of insurance. We need look no further than the Bank Act's treatment of another form of underwriting to support this argument. Section 24 of the Bank Act states that a national bank shall have the power to deal in securities and stock, but that

> [t]he business of dealing in securities and stock by the [bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of customers, and in no case for its own account, and the [bank] shall not underwrite any issue of securities or stock . . . .

12 U.S.C. § 24(Seventh); *see also NationsBank*, 513 U.S. at 256,115 S. Ct. at 813 (quoting language of the statute).

This section of the Bank Act was amended by section 16 of the Glass-Steagall Banking Act of1933, 48 Stat. 162,184 (codified as amended at 12 U.S.C. § 24(Seventh)). The reasons for the amendment were many, but most centered around the desire to prevent in the future the damage done to national banks by the then recent collapse of the stock market. Congress was concerned not only about the obvious danger to a bank's deposit accounts caused by its investment in speculative securities; it also was concerned about the indirect pressure that involvement in securities investment would cause. *See Investment Co. Inst. v. Camp*, 401 U.S. 617, 631,91 S. Ct. 1091, 1099, 28 L. Ed. 2d 367(1971) ("Moreover, the pressure to sell a particular investment and to make the affiliate successful might create a risk that the bank would make its credit facilities more freely available to those companies in whose stock or securities the affiliate has invested or become otherwise involved."). In short, it was feared that permitting banks to invest in securities "might impair [the bank's] ability to function as an impartial source of credit." *Id.* Similar concerns have been raised regarding a bank's engagement in tile business of insurance. *See Barnett Bank*, 43 F.3d at 636 ("[Solvency of insurance companies] could be threatened by pressures to make improper insurance decisions. This pressure could force an insurer to assume a bad risk to quickly consummate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit."). Both the business of insurance and investment in securities involve the same dangers with respect to a bank's involvement in them.

While the underwriting of insurance and securities have different qualities, both involve the fundamental feature of guarantying payment of proceeds. Those underwriting the issuance of a security guaranty that a certain amount of proceeds will be distributed to the issuer on a certain date (whether or not the underwriter is able to successfully market those securities), while the underwriters of insurance guaranty the distribution of proceeds contingent upon the occurrence of a specific event. Both involve placing their customer's assets at risk, at least to a certain extent. That being the case, it seems unreasonable to interpret the Bank Act impliedly to permit underwriting in one instance (Retirement CD) while expressly prohibiting it in another (securities). We therefore conclude that the Comptroller's determination that the Bank Act permits the issuance of the Retirement CD is unreasonable. Because the Bank Act may not be interpreted to authorize Blackfeet's issuance of the Retirement CD, the Commissioner may regulate the issuance of the Retirement CD under applicable Florida laws and regulations.

B.

Our conclusion that the Comptroller unreasonably expanded the powers of a national bank through its "no objection" letter to Blackfeet is a sufficient ground on which to affirm the district court, despite the fact that the district court did not rely on this ground. *See Johnson Enterprises of Jacksonville. Inc.* v. *FPL Group Inc.*, ___ F.3d ___ n.50 (11th Cir. 1998) [slip op. 94-3324, Dec.18, 1998] (concluding that this court may affirm a district court's judgment on any ground, regardless of whether that court addressed, adopted or rejected that ground in reaching its decision). There is, however, an alternative reason for affirming the district court's decision. Assuming arguendo that the Bank Act permits national banks to market the Retirement CD, we conclude that the

McCarran-Ferguson Act nonetheless enables the State of Florida to regulate the issuance of the Retirement CD in Florida. McCarran-Ferguson reverses the doctrine of preemption in cases involving state insurance laws, such that a state law specifically regulating the business of insurance shall preempt a conflicting federal law unless that federal law specifically relates to the business of insurance.[10] *See*

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[10] There has been some suggestion that the McCarran-Ferguson reverse preemption provisions should not apply in the context of the Bank Act, because the Bank Act was by its nature intended to preempt all conflicting state laws. In other contexts, federal laws involving issues of paramount national concern - such as the Foreign Sovereign Immunities Act (FSIA) and the Civil Rights Act of 1964 (Title VII) have been held to be exempt from the reverse preemption provisions of McCarran-Ferguson. *See Stephens v. National Distillers & Chem. Corp.*, 69 F.3d 1226, 1231 (2d Cir. 1995) (concluding that the FSIA preempts McCarranFerguson because its international law origins are "so different from the kind of congressional statutory action that the [Act] was enacted to deal with); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065 (2d Cir. 1982), *vacated*, 463 U.S. 1223,103 S.Ct. 3565,77 L. Ed. 2d 1406(1983), reinstated as modified, 735 F.2d 23 (2d Cir. 1984) (concluding that McCarran-Ferguson was not meant to preempt subsequently enacted civil rights laws that conflicted with the business of insurance). We find the Bank Act to be of a different nature from statutes that involve issues of paramount national concern, making it reasonable to conclude that that the Bank Act should be subject to McCarran-Ferguson's reverse preemption provisions. While we do not wish to diminish the importance of any action of Congress, we conclude that the Bank Act, given its nature as a strictly domestic set of purely economic regulations, does not reflect the same degree of national concern as FSIA or Title VII. *Cf. Stephens*, 69 F.3d at 1232.

Furthermore, the Supreme Court's analysis in *Barnett Bank* indicates that the Bank Act is in fact the type of congressional

United States Dept. of the Treasury v. Fabe 508 U.S. 491, 507, 113 S. Ct. 2202,2211;124 L. Ed. 2d 449 (1993). In part III. B. 1, we briefly discuss McCarran-Ferguson in order to provide context for the analysis that follows. In part III. B. 2, we address the question of whether Blackfeet's involvement with the Retirement CD constitutes the business of insurance. In part III.B.3, we determine whether the provisions of the Bank Act in question specifically relate to the business of insurance. [11]

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statutory action that McCarran-Ferguson was designed to address. *See Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25,38, 116 S. Ct. 1103, 1111, 134 L. Ed. 2d237 (1996); *See also Schacht*, 84 F.3d at 843-44 ("*Barnett Bank* demonstrates that the Bank Act possesses no unique immunity from the McCarran-Ferguson Act."). In *Barnett Bank*, the Supreme Court addressed the authority of national banks to sell insurance in towns with a population of under 5000. The Court determined that section 13 of the Bank Act "'specifically relate[d] to the business of insurance' [and that] therefore the McCarran-Ferguson Act's special anti-pre-emption rule [did] not apply.'" *Barnett Bank*, 517 U.S. at 38, 116 S. Ct. at 1111. Had the Court interpreted the Bank Act to carry the importance of Title VII, it could have disposed of Nelson's arguments in *Barnett Bank* by concluding that the Bank Act was not subject to the provisions of McCarran-Ferguson. That it did not suggests that in other circumstances the Bank Act could be subject to those reverse-preemption provisions. We therefore find *Stephens* and *Spirt*, which involved statutes that would never be subject to such preemption, distinguishable from this case

[11] Parts III.B.2 and 111.13.3 involve the second and third prongs of the three-pronged inquiry mentioned earlier. The first prong - whether the Florida statute in question was enacted "for the purpose of regulating the business of insurance" - is so obviously satisfied by the statute in question as to deserve no discussion.

1.

The McCarran-Ferguson Act, 15 U.S.C.§§ 1011-1015 (1994), was passed by Congress in 1945 in order to make it clear that states generally retained the power to regulate the business of insurance. The Act was passed in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944), which applied federal antitrust laws to insurance companies engaged in interstate commerce. *See Stephens v. National Distillers & Chem. Corp.*, 69 F.3d 1226, 1230 (2d Cit. 1995). Prior to *South-Eastern Underwriters*, it had been widely assumed that those transactions involving the business of insurance were not subject to federal regulation as interstate commerce. *See Fabe* 508 U.S. at 499, 113 S. Ct. at 2207. After *South-Eastern Underwriters*, insurers and states alike were uncertain as to who held the power to tax and regulate the insurance industry. *See id.* Their concern was that because the business of insurance was now considered interstate commerce, ordinary supremacy rules would curtail a state's ability to regulate insurance companies as they had in the past. *See id.* at 499-500, 113 S. Ct. at 2207. Congress quickly enacted McCarran-Ferguson in order to restore state supremacy in this context. *See id.* at 500, 113 S. Ct. at 2207.

McCarran-Ferguson states, in relevant part:

(a) State regulation

> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance

15 U.S.C. § 1012. Those two provisions act to reverse the ordinary preemption rules with respect to conflicting state and federal laws affecting the business of insurance. Specifically, they operate in tandem to fulfill the intent of Congress to defer to state systems of insurance regulation — by (1) expressly declaring that state regulation of insurance is in the public interest; and (2) "'removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation.'" *Fabe*, 508 U.S. at 500, 113 S. Ct. at 2207 (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408,429-30 ,66 S. Ct. 1142, 1155, 90 L. Ed. 1342 (1946)).

2.

The first issue we must resolve in applying the Act here is whether Blackfeet's issuance of the Retirement

CD is properly characterized as the business of insurance. The meaning of insurance" in the context of McCarran-Ferguson is a federal question. *See VALIC*, 359 U.S. at 69,79 S. Ct. at 621.

Blackfeet would have us assign the "annuity" label to the Retirement CD and thereafter endorse a general rule that annuities are not the business of insurance. Blackfeet cites for support *NationsBank*, which stated that "for the purpose at band, annuities are properly classified as investments, not 'insurance.'" *NationsBank*, 513 U.S. at 261, 115 S. Ct. at 815. As we concluded earlier, however, underwriting an annuity is of a different nature than brokering an annuity, and therefore *NationsBank* is distinguishable from the case at hand. Furthermore, our reading of *NationsBank* leads us to the conclusion that the Court did not intend a hard and fast rule regarding annuities, but rather acknowledged the need to analyze the issue on a case by case basis.[12] Both the Comptroller's assurance in *NationsBank* that the bank would not "have a principal stake in the annuity contracts " *see id.* at 260 n.4, 115 S. Ct. at 115 n.4, and the clause, "for the purpose at hand," support that reading. As such, we decline to apply an ambiguous label and engage in an abbreviated analysis for which our factual scenario appears ill-fitted.

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[12] We note that an almost endless array of products presently fall under the heading of annuities. There are fixed annuities and variable annuities, annuities for a term of years and annuities for the life of the annuitant. There are even annuities payable to a beneficiary for the life of another. Some ofthese annuities resemble a certificate of deposit with almost no traits of insurance, while others are almost indistinguishable from insurance. Given the wide range of possibilities, it would be unwise for us to force them all into one category for the purpose of determining what is and what is not the business of insurance.

Instead, we must analyze the general principles that help to define "the business of insurance." The Supreme Court first addressed this phrase in *SEC v. National Securities Inc.*, 393 U.S. 453, 89 S. Ct. 564,21 L. Ed. 2d 668 (1969). There, the Court found that such things as "[t]he relationship between insurer and insured, the type of policy which could be issued, and [that policy's] reliability, interpretation, and enforcement . . were [at] the core of the 'business of insurance.'" *Id.* at 460, 89 S. Ct. at 568. Although the Court noted that other activities of companies could find their way under the umbrella of "business of insurance," the focus of that phrase "was on the relationship between the insurance company and the policyholder." *Id.* at 460, 89 S. Ct. at 568-69; *see also Fabe,* 508 U.S. at 501,113 S. Ct. at 2208 (supporting that interpretation of "business of insurance"). Also important in defining something as "insurance" is whether the activity involves the underwriting of risk. *See VALIC*, 359 U.S. at 72-73, 79 S. Ct. at 622-23. The *VALIC* Court stated that "'true underwriting of risks [is] the one earmark of insurance.'" *Id.* at 73, 79 S. Ct. at 623.

These general principles make up the foundation of a three-part test articulated by the Supreme Court for determining whether an activity constitutes part of the business of insurance: "first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119,129;102 S. Ct. 3002,3009, 73 L Ed. 2d 647 (1982) (emphasis omitted).[13] Each of these criteria works in tandem with the others, and "[n]one of these criteria is necessarily determinative in itself." *Id.* After examining the Retirement CD under those three criteria, we find that it is part of the business of insurance.

First of all, it is clear that the Retirement CD involves the spreading or underwriting of a policy holder's risk. Although Blackfeet argues that "[t]he hazard of having insufficient investment acumen to outlive an asset . . is an investment risk, like the risk of misjudging whether a stock will go up or down," this argument mischaracterizes the risk. What purchasers are protecting against is simply the risk of outliving their means. In order to limit that risk, they purchase the Retirement CD, which ensures that they will receive periodic payments for life. Blackfeet assumes this risk for the policy holder in return for the fees it collects and the interest it draws from the use over time of their contributions. It uses standard actuarial tables in order to limit its exposure to these mortality risks.

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[13] *Pireno* addresses the second clause of §1012(b) of the Act (dealing specifically with antitrust immunity), while our concern is with the first clause of 1012(b) (addressing federal regulation of insurance generally). We understand the distinction made by the *Fabe* Court between the "business of insurance" (antitrust clause) and "laws enacted for the purpose of regulating the business of insurance" (general clause), *see Fabe*, 508 U.S. at 504,113 S. Ct. at 2209-10, but that distinction is inapposite to our case. We merely need to determine whether offering the Retirement CD to the public constitutes the "business of insurance." We cannot imagine that "business of insurance" could have two different meanings in the sane statutory subsection, and therefore we find it appropriate to use the *Pireno* test in making our determination.

We frankly do not see the difference between insuring against living too long (which in essence is what this Retirement CD provides for) and insuring against dying too soon. Moreover, we note that other insurance products "collision" car insurance, for example—operate in exactly the same fashion as the Retirement CD; essentially, they protect the insured from his own insufficient acumen in other contexts. We therefore find Blackfeet's arguments unpersuasive and conclude that this practice is properly characterized as underwriting a policyholder's risk.

As to the second prong of the *Pireno* test, it is clear that Blackfeet's sale of the Retirement CD is "an integral part of the policy relationship between the insurer and the insured." *Id.* at 129, 102 S. Ct. at 3009. In fact, as the *Schacht* court pointed out, "[the Retirement CD] is not only an integral part of the policy relationship between the insurer and the insured, it is the very document that evidences that relationship." *Schacht*, 84 F.3d at 842. We cannot imagine anything more integral to the insurer/insured relationship.

Finally, the sale of the Retirement CD satisfies the third prong of the *Pireno* test. While being careful not to label the Retirement CD, we note that the vast majority of annuities to which the Retirement CD is similar - are issued by insurance companies. *See id.* The Schacht court, citing a 1994 BARRON'S article, noted that "nearly all of the $1 trillion worth of annuities currently in effect in the United States are issued by regulated insurance companies." *Id.* This information appears to indicate that the issuance of annuities is limited to entities within the insurance industry.

Blackfeet makes the point that thousands of "gift annuities" are issued each year by charitable organizations in the form of charitable remainder annuity trusts. *See* I.R.C. § 664 (1994). Given this fact, it argues, annuities cannot be deemed to be limited to the insurance industry. We disagree. Charitable organizations repeatedly have received special consideration from the Congress and the Internal Revenue Service. *See id.* The mere fact that they have been permitted to issue gift annuities should not be read to grant a general power to any entity to do the same.

We do acknowledge that the 1990's have witnessed an expansion of bank participation in the brokering of annuities, supported both by the Comptroller and the

Supreme Court. *Cf. NationsBank*, 513 U.S. at 261, 115 S. Ct. at 815. A recent newswire report indicated that bank activity in the United States insurance industry will grow by almost one-third annually over the next four years, due in large part to the sale of annuities. SEE XINHUA WORLD ECON. NEWS SUMMARY AT 0500 GMT, Xinhua Eng. Newswire, Nov. 27, 1998. These facts, however, speak only to brokering annuities. They do not indicate an increase in underwriting insurance products by banks, which is the practice being scrutinized here. Furthermore, we have found no commercial examples where any entity other than an insurance company has underwritten this type of product (meaning a product similar to a fixed-rate life annuity). That being the case, we conclude that the third prong of *Pireno's* test is satisfied. [14]

As we stated earlier, the *Pireno* test does not turn on anyone of its factors; rather, each of the factors is analyzed in context with the others. The facts in this case, when examined under the *Pireno* factors, indicate that the issuance of the Retirement CD involves the business of Insurance. The underlying principles ofthe business of insurance, as found in *Fabe, VALIC*, and *National Securities*, support the same conclusion.

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[14] Aside from attacking the assertion that the Retirement CD satisfies the first and third prongs of the *Pireno* test, Blackfeet also challenges generally the application of the test to this case. According to Blackfeet, terms such as "insurance policy" and "insured" suggest that the test was meant to examine only "ancillary conduct of an insurance company (not a federally chartered corporation)." While it may be that the Supreme Court has never examined non-insurance company activity under this test, we find no compelling reason why this test should not apply in the instant case. When determining what is the business of insurance, it is the activity with which we are concerned. Who conducts the activity should not affect the application of the test, but should only bear upon its third prong, if at all.

3.

Having determined that the Retirement CD involves the business of insurance, we must determine whether the federal statute in question - here, the Bank Act "specifically relates to the business of insurance" so as to overcome the reverse preemption provisions of McCarran-Ferguson. We conclude that the Bank Act does not specifically relate to the business of insurance.

We base this decision on the Supreme Court's reasoning in *Barnett Bank of Marion County NA. v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103,134 L. Ed. 2d 237(1996). There, the Court addressed the application of McCarran-Ferguson to section 13 of the Bank Act, which permits banks in towns of under 5000 population to offer insurance products to its customers. The pertinent language of section 13 is as follows.

> [A]ny such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may . . . act as the agent for any fire, life, or other insurance company. . . by soliciting and selling insurance and collecting premiums on policies issued by such company.

12 U.S.C.§92. The Court interpreted McCarran-Ferguson as a means "to protect state regulation primarily against inadvertent federal intrusion - say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to comprise one part." *Barnett Bank*, 517 U.S. at 39,116 S. Ct. at 1112. Under that interpretation, the Court concluded that section 13 did in fact specifically relate to the business of Insurance. It based this conclusion on language in the statute, which included such terms as "insurance," "insurance company," "premiums," and "policies." The Court stated:

> The language of the Federal Statute before us is not general. It refers specifically to insurance. Its state regulatory implications are not surprising, nor do we believe them inadvertent. Consequently, considerations of purpose, as well as of language, indicate that [section 13 falls within the scope of the McCarran-Ferguson's "specifically relates" exception to its anti-pre-emption rule.

Id. at 41,116 S. Ct. at 1112-13 (citation omitted).

In contrast to *Barnett Bank,* the statutory language in our case does not specifically relate to the business of insurance. As stated earlier, the provisions of the Bank Act relied on by Blackfeet for authority to market the Retirement CD involve "a bank's express authority to accept deposits and enter into contracts, and authority to incur liabilities and fund its operations." *See* 12 U.S.C. § 24(Third), (Seventh).

Unlike section 13, section 24(Seventh) contains no specific reference to "insurance," or "premiums," or "policies," or any phrases generally associated with the business of insurance. Nor does it director authorize banks to engage in activities normally engaged in by insurance companies. Section 24(seventh) is a provision with broad, general terms, which Blackfeet wants to extend to cover the business of insurance.

This extension, however, is "exactly the intrusion the [*Barnett Bank*] Court warrned against: [the provisions of the Bank Act] describe an affected activity (banking) in broad terms, of which the insurance business (the Retirement CD) is only apart." *Schacht*, 84 F.3d at 843. We therefore agree with the *Schacht* court that section 24(Seventh) does not specifically relate to the business of insurance, and therefore the Bank Act is not saved from the reverse preemption of McCarran-Ferguson with regard to Florida insurance regulation of the Retirement CD.

IV.

The involvement of banks in the business of insurance has become a politically charged issue in recent times. There certainly is a trend developing towards deregulation in all areas of the financial services industry, and there is some indication that Congress will address regulation of banks offering insurance products in the near future. *See* INSURANCE & ANNUITIES: DUAL INSURANCE REGULATION BROACHED, Bank Mutual Fund Report, No.6, Feb. 9, 1998. We are required, however, to make our determination based on the law presently in force. Under that law, it is unreasonable for the Comptroller to conclude that issuing the Retirement CD is authorized as the business of banking by the Bank Act. Alternatively, assuming that the Retirement CD can appropriately be considered the business of banking, we nevertheless conclude that the Commissioner may regulate its issuance within the State of Florida. For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TA 94-40496-WS

BLACKFEET NATIONAL BANK and
AMERICAN DEPOSIT CORPORATION,
Plaintiff,

v.

BILL NELSON, as Treasurer and Insurance
Commissioner, of the State of Florida,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

**[Stamp: Office of the Clerk, U.S. District Ct.,
North Dist., FLA. Tallahassee, FL
June 13, 1996, 10:19, AM]**

Plaintiff Blackfeet National Bank ("Blackfeet") is a national banking association organized and operated pursuant to the National Banking Act, Title 12, United States Code, Section 21 et seq. Blackfeet issues what is referred to as a "Retirement CD", a product developed by plaintiff American Deposit Corporation ("ADC") and issued by Blackfeet under a licensing agreement with ADC. On July, 13, 1994, Tom

Gallagher, in his then capacity as Treasurer and Insurance Commissioner of the State of Florida,[1] issued a show cause order and instituted administrative proceedings against Blackfeet and ADC concerning Blackfeet's issuing and marketing the Retirement CD in the State of Florida. The crux of the allegations charge Blackfeet and ADC with engaging in the insurance business in the State of Florida in violation of Florida law

Blackfeet and ADC have instituted the present action against defendant seeking a declaratory judgment that Blackfeet is authorized, by the powers conferred upon it by the National Banking Act, to receive and accept the Retirement CD, and that it is not subject to control or regulation by the State of Florida pursuant to its insurance laws. Blackfeet and ADC further seek an injunction restraining defendant from going forward with the administrative proceeding or otherwise interfering with the offering of the Retirement CD. Plaintiffs have filed suit pursuant to Title 42, United States Code, Section 1983 and Title 12, United States Code, Section 24.

On August 28, 1995, this court denied plaintiffs' motion for summary judgment. The court found that there were no material issues of fact in dispute and concluded that although the Retirement CD qualified as an authorized bank product under Title 12, United

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[1] Bill Nelson has since been substituted for Gallagher. Document 104 at n. 1.

States Code, Section 24, it also, as a matter of law, qualified as insurance under the McCarran-Ferguson Act, which reverses the rule of federal preemption, and thus the State of Florida could regulate the same pursuant to its insurance laws. See Document 104. Pending before the court at this time are plaintiffs' motion for reconsideration (document 105) and renewed motion for summary judgment (document 108) and defendant's motion for summary judgment (document 106). On April 1, 1996, the court, in view of the United States Supreme Court's decision in *Barnett Bank Of Marion County. N.A. v. Nelson*, —U.S.—; 116 S.Ct. 1103 (1996), directed the parties, and amicus curiae, to submit supplemental memoranda of law on the issues pending before the court.

Plaintiffs move the court to reconsider its decision concluding that the State of Florida can regulate the Retirement CD. Plaintiffs first argue that the Florida First District Court of Appeal in State. Department of *Insurance v. Great Northern Insured Annuity Corporation*, 667 So. 2d 796 (1995), held that annuities are not insurance under the Florida Insurance Code and thus the Retirement CD, as an annuity, is not subject to regulation under Florida's Insurance Code. Second, plaintiffs argue that if the Retirement CD qualifies both as an insurance product and an authorized bank product, then the provisions of the Banking Act which authorize the Retirement CD must specifically relate to the business of insurance so as to fit within the McCarran-Ferguson exception that reinstates federal law as supreme.

As noted most recently by the United States Seventh Circuit Court of Appeals in *American Deposit Corporation v. Schacht*, —F.3d—, 1996 WL 252869, "[t]he tension in this case comes from the apparent overlap between activities . . . authorized by the Bank Act and activities that individual states have an interest in regulating." In this light, the analytical frame work in which the issues presented are reviewed must be discussed once again.

Ordinarily, a federal law preempts a conflicting state law under the Supremacy Clause of Article VI of the Constitution. The National Banking Act, Title 12, United States Code, Section 21 et seq., which constitutes the paramount authority for the operation of the national banking associations, and, by itself, serves as the complete system for the establishment and government of national banks, "is of no exception." *See Barnett Bank*, 116 S. Ct. at 107–08; accord Document 104 at 13. Notwithstanding, with respect to the business of insurance," the McCarran-Ferguson Act[2] reverses the normal rules of preemption by imposing a rule that state laws enacted for the purpose of regulating the business of insurance [3] do not yield to conflicting federal statutes unless the federal statute itself specifically relates to the business of insurance. *Barnett Bank*, 116 S.Ct. at 1111.

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[2] The McCarran-Ferguson Act reads in pertinent part:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . .

Plaintiffs argue that the McCarran-Ferguson Act does not apply to this case because the Retirement CD is not the "business of insurance." Plaintiffs made this argument to the court in their initial motion for summary judgment and the same was rejected. Document 104 at 21 26. Plaintiffs now argue, however, that the decision of the Florida First District Court of Appeal in *Great Northern, supra*, "fundamentally transforms the premises upon which [this court's] Order is based" in that the court in *Great Northern* held that "annuities are not insurance under the Florida Insurance Code." Document 105 at 3. Even assuming that *Great Northern* stands for the proposition that annuities are not insurance, the same is not dispositive of the issue at hand. The meaning of insurance under the McCarran-Ferguson Act is not question of state law, but rather is one of federal law. *S.E.C. v. Variable Annuity Life Ins. Co.* ("VALIC"), 359 U.S. 65, 69 (1959); Document 104 at 24. What must be examined is whether the practice in question — in this case underwriting of the Retirement CD — is properly considered insurance. [4]

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[3] The Supreme Court in *Barnett Bank* did not overrule the portion of the Eleventh Circuit's opinion that found that Section 626.988(2) regulated the business of insurance within the meaning of the McCarran-Ferguson Act. Accordingly, the court considers this aspect of the Eleventh Circuit opinion authoritative and will not revisit the issue.

As this court attempted to articulate in its August 28, 1995, order denying plaintiffs' summary judgment, the Supreme Court has spoken on the issue of what constitutes "insurance" under the McCarran-Ferguson Act by identifying certain criteria relevant to the inquiry. Most important is whether the activity in question has the effect of underwriting or spreading a policyholder's risk. *Group Life & Heath Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211(1979). Among the fundamental characteristics of insurance is the combination of mortality [5] and a guarantee payment of a fixed return. *VALIC*, 359 U.S. at 71.[6] As previously noted by this court, the Retirement CD has the component fundamental risk shifting characteristics of insurance identified by the Supreme Court in that it offers both a guaranteed payment to the annuitant for the rest of his or her life in a predetermined amount and a guarantee return of the total balance. Document 104 at 26.

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[4] The *Great Northern* case does not change the fundamental premise upon which the court's order denying plaintiffs' summary judgment is based. The decision in *Great Northern* did not address whether national banks could underwrite annuity products free from state regulation. Rather, the court in *Great Northern* was concerned with the ability of Florida Chartered banks to sell annuities in the same manner as national banks pursuant to the parity provision of Florida's Insurance code, Section 626.988(8), Florida Statutes. The *Great Northern* court, following the decision of the Supreme Court in *Nationsbank of North Carolina N.A. v. Variable Annuity Life Insurance Company*, —U.S.—, 115 S.Ct. 810 1995) held only that "[i]n the event that a national bank is authorized... to sell one or more types of annuities in Florida pursuant to federal law, Florida Chartered banks... shall be authorized to sell the same type of annuities notwithstanding the provisions of this section . . . ."

[5] Mortality risk encompasses the transfer of economic risk of death from the consumer of a product to the issuing company. "Essentially, lifetime annuities such as the Retirement CD are "mirror images of life insurance policies. With life insurance, the issuing company gambles that the purchaser of the policy will not

The court is not alone in the above holding. Most recently the United States Seventh Circuit Court of

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pass away sooner than predicted such that the company does not receive enough in premiums and interest to cover the policy's payout obligation." *Schacht*, 1996 WL 252869 at 4. The legal form of a life annuity, like the Retirement CD, involves an agreement by one party (the annuitant) to pay money to another party (the institution) in exchange for a promise to be repaid the contributed amounts plus interest in periodic payments that continue throughout the life of the annuitant. The annuity contract protects the annuitant from the possibility of out living his or her resources. The amount of the periodic payments are determined by the life expectancy of the annuitant pursuant to actuarial calculations. The annuitant risks that death will come before he or she receives annuity payments in the amount he or she expended to purchase the annuity. In guaranteeing periodic payments for the lifetime of the annuitant, the issuing entity gambles that the annuitant will die prior to the actuarial predictions and not live so long that the total of the periodic payments will exceed the value of the price received for the annuity.

[6] Although the court in *VALIC* did not hold "as a universal matter that a combination of mortality risk and the guarantee payment of a fixed return... invariably makes an arrangement one of insurance " (document 105 at 5 n. 5), the presence of these characteristics are key indicators that a product is insurance.

Appeals, faced with the identical issue before this court, held in *Schacht, supra*, that the Retirement CD was "the business of insurance" for purposes of the McCarran-Ferguson Act."*Schacht*, 1996 WL 252869 at 6. In so concluding, the Seventh Circuit, like this court, focused on the risk shifting characteristics of the Retirement CD.

> The Retirement CD ... offers a guaranteed payment to the annuitant for the rest of his life in a predetermined amount and also provides a guaranteed return on the total balance. Thus it involves both fundamental characteristics of insurance: a mortality risk and a guaranteed return.

Id. at 5[7]

Plaintiffs also argue that the McCarran-Ferguson Act's reverse preemption rule does not apply to this case because Title 12, United States Code, Section 24 (Third) and (Seventh) specifically relate to the business of insurance. Plaintiffs aver that because this court found the Retirement CD to qualify as both an insurance product and an authorized bank product, the National Banking Act provisions that authorizes the Retirement CD – Title 12, United States Code, Section 24 (Third) and (Seventh), specifically relate to the business of insurance. Thus, according to plaintiffs,

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[7] The Seventh Circuit also noted in *Schacht* that the legislative history of the McCarran-Ferguson Act also supported the conclusion that the Retirement CD is the business of insurance.

"the McCarran-Ferguson reverse preemption is inapplicable." Document 105 at 6.

Given the Supreme Court's recent decision in *Barnett Bank, supra,* the court concludes that Title 12, United States Code, Section 24 (Third) and (Seventh) do not specifically relate to the business of insurance. *Barnett Bank* involved a direct conflict between Section 626.988, Florida Statutes, which prohibits banks from selling insurance and Title 12, United States Code, Section 92, which permits banks to act as insurance agents in towns with populations of less than 5000 people. Among the issues before the court was whether the McCarran-Ferguson Act allowed Section 626.988 to stand despite Section 92.

The Supreme Court concluded that McCarran-Ferguson reverse preemption did not apply to the case because Section 92 specifically related to the business of insurance. The Court relied on the fact that Section 92 "explicitly" granted national banks permission to sell insurance and that the statute contained specific rules prohibiting banks from guaranteeing premium payments or the truth of statements made by the assured.

> [U]sing ordinary English, one would say that this statute specifically relates to the *business of insurance*. The statute explicitly grants national banks permission to act as the agent for any fire, life, or other insurance company, to solicit and sell insurance, to collect premiums, and to receive for services so

> rendered... fees or commissions, subject to the Comptroller regulation. It also sets forth certain specific if lies prohibiting banks from guaranteeing the payment of any premium on insurance policies issued through its agency... and the truth of any statement made by an assured in filing his application for insurance. The statute thereby not only focuses directly upon industry-specific selling practices, but also affects the relation of insured to insurer and the spreading of risk--matters that this Court, in other contexts, has placed at the core of the McCarran-Ferguson Act's concern.

Id. at 1111 – 12. The court found that the purpose of the McCarran-Ferguson Act was not to insulate state insurance regulation from the reach of all federal law, but "to protect state regulation primarily against inadvertent federal intrusion--say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which insurance business happens to comprise one part." *Id.* at 1112.

Unlike Section 92 of Title 12, the provisions of Title 12, United States Code, Sections 24 (Third) and (Seventh)--the power to accept deposits and to enter into contracts--contain no reference to insurance. As noted by the Seventh Circuit in *Schacht*, "[neither provision "explicitly grants banks permission to conduct insurance-related activity; neither focuses directly on specific insurance selling practices; and neither affects the relation of the insured to insurer and the spreading of risk."*Schacht*, 1996 WL 252869 at

7. To the contrary, in the context of the Retirement CD, Section 24 (Third) and (Seventh) "are exactly the intrusion the Court warned against: both sections describe an affected activity (banking) in broad terms, of which the insurance business (the Retirement CD) is only a part." *Id.*

The mere fact that this court has held that the Retirement CD qualifies as an authorized bank product does not mean that state insurance regulation is supplanted. As the Supreme Court held in *Nationsbank*, "a characterization fitting in certain Contexts my be unsuitable in others." 115 S.Ct. at 816. Even the Office of the Comptroller of the Currency ("OCC"), the federal agency that regulates national banks, acknowledges that defendant has regulatory authority over the Retirement CD.

> While the Retirement CD possesses some of the characteristics of an annuity, as a legal matter our no-objection position [to the issuance of the Retirement CD by national banks] is not an authorization for banks to underwrite annuities. In concluding that the Retirement CD represents a bank authorized product, we did not need to address the question of whether the bank is authorized to sell or underwrite annuities, or whether annuities are insurance products.
>
> Our analysis and conclusion were limited to a determination of the bank's authority to conduct the business of banking under the National Bank Act. State regulatory officials

> may conclude that the state insurance laws also apply to the Retirement CD or any other activity which we interpret as being an authorized by the National Bank Act. Such a conclusion, however, does not affect our interpretation of the Act. A state's insurance laws and the National Bank Act are different laws with different purposes behind them.

Document 83, exhibit 2. The OCC would certainly have taken a different tack with respect to the Retirement CD if it believed that state insurance laws necessarily had to yield to the power of national banks because the National Banking Act relates to the business of insurance. The court's construction of the Retirement CD as a hybrid product that qualifies as both a bank product under the National Banking Act and insurance under the McCarran-Ferguson Act is not inconsistent or "grossly anomalous." The explication simply reconciles "two bodies of federal law in a manner that respects the Congressional limitations of each" in lieu of the facts before the court. *Schacht*, 1996 WL 252869 at 8.

As this court has previously stated, "[t]he Retirement CD is a hybrid product with characteristics that qualify it as both an authorized bank product under the National Ba[n]king Act and insurance under the McCarran-Ferguson Act." Because the relevant sections of Florida's Insurance Code were enacted for the purpose of regulating the business of insurance, and because the National Banking Act does not relate to the business of insurance, the McCarran-Ferguson

Act permits defendant to regulate the Retirement CD in the State of Florida.

Accordingly it is ORDERED:

1. The court's October 28, 1995, order (document 104) is incorporated by reference into and made part of this order of the court.
2. Plaintiffs' motion for reconsideration (document 105) and renewed motion for summary judgment (document 108) are DENIED.
3. Defendant's motion for summary judgment (document 106) is GRANTED. The clerk is directed to enter judgment in favor of defendant and against plaintiffs.
4. All motions which remain pending are DENIED as moot.

DONE AND ORDERED this 13th of June, 1996.

/s/ William Stafford

WILLIAM STAFFORD
UNITED STATES SENIOR DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TAC 94-40496-WS

BLACKFEET NATIONAL BANK and
AMERICAN DEPOSIT CORPORATION,

Plaintiffs,

v.

BILL NELSON as Treasurer an
Insurance Commissioner of the State of Florida,

Defendant.

ORDER DENYING SUMMARY JUDGMENT

Before the court are plaintiffs' motion for summary judgment (document 23) and defendant's amended response thereto (document 83). Also before the court are the amicus briefs of the American Counsel of Life Insurance and the National Association of Life Underwriters. The parties and amicus have also supplemented their memorandum on numerous occasions (documents 57, 65, 71, 76, 79 and 82). On March 3, 1995, the court heard argument on the motion for summary judgment and at the conclusion thereof directed the parties to submit supplemental briefs (documents 90, 92 - 103).

I. *Facts*:

Plaintiff Blackfeet National Bank ("Blackfeet") is a national banking association organized and operated pursuant to the National Banking Act, Title 12, United States Code, Section 21 *et seq.*

Blackfeet issues what is referred to as a "Retirement C.D.," a product developed by plaintiff American Deposit Corporation ("ADC") and issued by Blackfeet under a licensing agreement with ADC. On July 13, 1994, Tom Gallagher[1], in his then capacity as Treasurer and Insurance Commissioner of the State of Florida, issued a show cause order and instituted an administrative proceeding against Blackfeet and ADC concerning Blackfeet's issuing and marketing the Retirement CD in the State of Florida. The crux of the allegations charge Blackfeet and ADC with engaging in the insurance business in the State of Florida in violation of Florida law.

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[1] Initially, this suit named Gallagher in his individual and official capacity. During the March 3, 1995, hearing on the motion for summary judgment, plaintiffs' counsel, in response to the court's inquiry, notified the court that they were no longer seeking damages against Gallagher in his individual capacity and that they would file the appropriate pleading so as to substitute Bill Nelson, the current Treasurer and Insurance Commissioner, for Gallagher. Document 89 at 20. Although to date that pleading has not been filed with the court, based upon plaintiffs' counsel's representations, the court, pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure substitutes Bill Nelson for Gallagher.

Blackfeet and ADC have instituted the present action against defendant seeking a declaratory judgment that Blackfeet is authorized, by the powers conferred upon it by the National Banking Act, to receive and accept the Retirement CD, and that it is not subject to control or regulation by the State of Florida pursuant to its insurance laws. Blackfeet and ADC further seek an injunction restraining defendant from going forward with the administrative proceeding or otherwise interfering with the offering of the Retirement CD. Plaintiffs have filed suit pursuant to Title 42, United States Code, Section 1983 and Title 12, United States Code, Section 24 and have moved for summary judgment on the above.

a. *The Retirement CD*:

The Retirement CD is a product which has been categorized by the plaintiffs as having traditional characteristics of a certificate of deposit and similarities with an annuity. The Retirement CD has two phases; an accumulation phase and a payout phase. Document 83, exhibit 3.

1. *Accumulation Phase*:

The Retirement CD is offered to individuals who open an account by making a deposit of at least $5,000. *Id.* at exhibit 7. During the accumulation phase of the Retirement CD, an individual pays money into an account which accumulates interest over a fixed period of time and builds value. Specifically, at the time of the initial deposit, the Retirement CD customer is offered a maturity date for the account. *Id.* During the period before the maturity date, interest on the deposit is credited to the account. Each customer is entitled to select a term from one to five years during which the interest rate will remain fixed, and after which the rate will fluctuate (never less than 3%) in accordance with Blackfeet's cost of funds. *Id.* A customer can make additional deposits into the account up and until the maturity date but may not withdraw funds without incurring a penalty. *Id.*

2. *Payout Phase*:

On the maturity date, the customer will select various options for repayment. The options available allow the customer to withdraw up to two-thirds of the balance in the customer's account (the principle plus the accrued interest) on the maturity date. *Id.* The balance of the account is distributed to the customer in fixed monthly amounts, including interest, for the customer's life. *Id.* Even if the depositor continues to live after receiving a return on the maturity balance, he or she, nonetheless, will continue to receive distributions. *Id.* The monthly distributions are determined with reference to permanent purchase rate guarantees at competitive interest rates (a minimum interest rate of 3%) and includes a refund feature. Under the refund feature, a customer, or his or her beneficiary, is guaranteed to receive an amount at least equal to the customer's account balance on the maturity date. *Id.*

II. *Analysis*:

a. Is Blackfeet Authorized To Sell The Retirement CD:

In addressing the motion for summary judgment, the first issue to be resolved is whether Blackfeet, as a national bank, is authorized to issue the Retirement CD.

The National Banking Act, Title 12, United States Code, Section 21 *et seq.*, authorizes national banks to carry on the business of banking. Among the core banking powers expressly conferred on national banks is the power to accept deposits. 12 U.S.C. § 24 (Seventh); *Department Of Banking And Consumer Finance v. Clarke*, 809 F.2d 266, 268 (5th Cir. 1987) *cert. denied* 403 U.S. 1010 (1987). National banks have the power "to make contracts," and

> [t]o exercise. . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; *by receiving deposits*; by buying and selling exchange, coin, and security; and by obtaining, issuing, and circulating notes. . . .

12 U.S.C. §§ 24 (Third & Seventh)(emphasis added).

Among the issues before the court is whether the Retirement CD qualifies as a product able to be issued by the national bank under the authority of the banking act. Plaintiffs argue that the Retirement CD qualifies as a bank deposit and that accordingly

Blackfeet, as a national bank, is authorized under the National Bank Act to receive it.

In support of their contention that the Retirement CD is a bank deposit, plaintiffs proclaim that the Office of the Comptroller of the Currency ("OCC"), the federal agency that regulates national banks, has found that the acceptance of the Retirement CD by Blackfeet falls within the core powers of national banks to accept deposits and make contracts and that the OCC has no objection to its being offered by Blackfeet subject to implementation of certain requirements for the protection of depositors. *See* Document 17, exhibit 1 (May 12, 1994 letter from OCC).

> *In the instant case, the express authorization for the Bank to receive deposits and enter into contracts, coupled with its powers to incur liabilities and fund its operations, clearly make the Retirement CD an authorized Bank activity.* The inherent relationship that the Retirement CD customer has with the Bank is that the depositor or creditor. The customer places funds with the Bank and in turn receives the Bank's promise to repay the amount it has received, plus interest. This promise forms the very basis of the depositor or creditor/bank relationship.
>
> * * *
>
> *The Retirement CD is clearly a financial product whose primary attributes are grounded in the Bank's expressly authorized powers.* While somewhat novel in its approach to

> determining interest on deposits [sic] funds by providing customers, *inter alia*, with fixed periodic lifetime payment, the Retirement CD nonetheless represents fundamentally a bank authorized product. In recent years, national banks have responded to changing customer needs and market forces by offering a range of innovative *bank deposit related instruments*. . . .

Id. (emphasis added).

Plaintiffs further maintain that the Federal Deposit Insurance Corporation ("FDIC") has also determined that the Retirement CD is a bank product which is federally insured up to the maturity date. *See* Document 17, exhibit 2 (May 12, 1994 letter from FDIC)

> With regard to the extent of the FDIC insurance, we have concluded that the a [sic] Retirement CD will be insured for the same amount (up to a maximum of $100,000) that would be payable to an account holder's beneficiary in the event of the account holder's death. That is, in the event the issuing bank were to fail prior to the maturity date, a Retirement CD would be insured to the same extent as any other type of CD, *i.e.*, for principal and accrued interest up to the date of failure. In the event that the bank were to fail after the maturity date, the FDIC would pay a customer the balance of the account at the maturity date (principal plus accrued interest) minus any lump sum distribution and any

> monthly payments, up to a maximum of $100,000. *Under no circumstances would FDIC insurance extend to the bank's commitment to make lifetime payments, as the value of such payments is uncertain and may exceed the total account balance.*

Id. (emphasis in original).

One question that has arisen in this case, is what weight to give to the OCC no objection letter. As the office charged with the supervision of the National Banking Act, the OCC bears the primary responsibility for surveillance of the business of banking. *Nationsbank of North Carolina v. Variable Annuity Live Ins. Co.*, —U.S.—, 115 S.Ct. 810 (1995). As a general rule, courts give great weight to any reasonable construction of a regulatory statute *adopted* by the agency charged with the enforcement of the statute. *Id. citing Clarke v. Securities Indus. Ass.*, 479 U.S. 388, 403 - 04 (1987)(emphasis added); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

> Under the formulation now familiar, when we confront an expert administrator's statutory exposition, we inquire first whether the intent of Congress is clear as to the precise question at issue. If so that is the end of the matter. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is *whether the agency's answer is based on a permissible construction of the statute.* If the administrator's reading fills a

> gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment controlling weight.

NationsBank, 115 S.Ct. at 813. (citations and internal quotations omitted).

The above is particularly true where the question involves "expert judgment regarding the practical operation of the banking industry and the results that might be anticipated if particular business practices were instituted." *Investment Co. Inst. v. Clarke*, 793 F.2d 221, 222 (9th Cir.1986), *cert. denied*, 479 U.S. 939 (1986).

In this case, the OCC's no objection letter authorizing Blackfeet to sell and market the Retirement CD because it is a bank deposit is persuasive authority if it is reasonable in light of the purpose of the National Banking Act. *First Nat'l Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 777 (8th Cir. 1990)(determination of OCC as to what activities are authorized under the National Banking Act should be sustained if reasonable); *but see American Deposit Corp. v. Schacht*, 887 F.Supp. 1066, 1076 (N.D.Ill. 1995)(refusing to give weight to the OCC's no objection letter).

Defendant takes the position that the OCC's no objection letter is unreasonable. The gist of defendant's contention is that the OCC incorrectly focused on the Retirement CD's return of principal and interest in reaching its conclusion. Defendant maintains that the

OCC instead should have viewed the Retirement CD in light of its true selling component—the receipt by the customer of monthly payments after the maturity balance posted has been exhausted. Defendant maintains that these payouts, those made after the exhaustion of principal and interest, are indemnification by the bank using funds not belonging to the Retirement CD owner and that such payments constitute insurance and not a bank deposit. According to defendant, the OCC's treatment of the after exhaustion payments as interest loses sight of the fundamental principle that once the bank pays back the principal and interest due, any additional payments made are not interest but something else, *i.e.*, insurance.

Despite defendant's argument, the OCC's no objection letter finding that the Retirement CD qualifies as a bank deposit is reasonable in light of the purpose of the National Banking Act. The Supreme Court has recently upheld as reasonable the OCC's determination that national banks have the authority under the *National Banking Act* to operate as agents for insurance companies with respect to the sale of annuities because such activity qualifies as part of, or incidental to, the business of banking. *NationsBank of North Carolina*, 115 S.Ct at 814 - 15. The holding analogized conventional annuities to bank deposits and held that under the National Banking Act, the same qualified as investment products.

> By making an initial payment in exchange for future income stream, the customer is deferring consumption, setting aside money for retirement, future expenses, or a rainy day. For her, an annuity is like putting money in a bank account, a debt instrument, or a mutual fund. Offering bank accounts and acting as agent in the sale of *debt instruments* and mutual funds are familiar parts of the business of banking.
>
> * * *
>
> In sum, modern annuities, though more sophisticated than standard savings bank deposits of old, *answer essentially the same need*. By providing customers with the opportunity to invest in one or more annuity options, banks are essentially offering financial investment instruments of the kind congressional authorization permits them to broker. Hence, the Comptroller reasonably typed the permission of NationsBank sought as an "incidental powe[r]. . . necessary to carry on the business of banking.

Id. at 815.

The OCC in this case did not just focus on the principal and interest component of the Retirement CD as defendant suggests. The OCC also considered the payout structure encompassed in the payout phase of the CD and found that it did not change the conclusion that the Retirement CD qualified as a bank deposit.

> The fact that the product is structured to provide for interest payments keyed in part to the expected life of the depositor does not change the intrinsic nature of the Retirement CD as an authorized bank product. Modernizing bank practices to comport with ever changing customer needs is permissible, provided that the practices remain fundamentally what is authorized by the Act. In addition, utilizing creative funding techniques is a desirable, indeed necessary action for national banks.

Document 17, exhibit 1 (May 12, 1994, letter from OCC).

The OCC clearly understood the implications surrounding the provision of the Retirement CD that allowed for potential payouts to a depositor beyond the exhaustion of the maturity balance. Indeed, the OCC recognized potential obstacles associated with the bank's receipt of the Retirement CD and sought to correct the problems by imposing a comprehensive set of *banking* regulations that Blackfeet, and other national banks, must comply with. Among the conditions mandated by the OCC is that Blackfeet take appropriate steps to mitigate the risks entailed in assuming an obligation to make payments to the depositor over the depositor life.

> The Bank should take appropriate steps to deal with the risks it will undertake in connection with the Retirement CD. In particular, we note that the Bank assumes the risk of paying interest throughout the life of

> each depositor even in situations where the maturity balance becomes exhausted. The Bank's business plan should indicate in detail how it plans to mitigate this risk as well as the other risks, and consideration should be given to purchasing commercially available annuities from insurance companies to fund the Bank's payment obligations.

Id.[2]

Despite the concerns that the Retirement CD had characteristics in common with an annuity, the OCC, nevertheless, determined that the Retirement CD *retained enough qualities* to qualify as a bank deposit able to be issued and marketed by Blackfeet under the National Banking Act. *First Nat'l Bank of Eastern Arkansas*, 907 F.2d at 778 (courts that have considered similar issues look to see if the activity in question is closely related to an express power and is useful in carrying out the business of banking). Although not defined by the National Banking Act, a bank deposit, as the term is generally defined, means

> [t]he act of placing money in the custody of a bank or banker, for safety or convenience, to be withdrawn at the will of the depositor or under rules and regulations agreed on.

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[2] The OCC plans to regulate the actuarial risks posed by the Retirement CD product, including the mortality risk. The OCC will review Blackfeet's compliance with the above conditions and "evaluate the manner in which it utilizes funds received from the Retirement CD and funds these obligations."

Black's Law Dictionary, "Deposit" (6th Ed. 1990). The Retirement CD meets the definition of deposit. The Retirement CD "represents the very essence of banking which is embodied in a bank's express authority to accept deposits and enter into contracts, and authority to incur liabilities and fund its operation." Document 17, exhibit 1.

> In terms of its association with the business of banking, the Retirement CD "allows a bank to offer to its customers, in combination with its other banking related products, the traditional financial advantages normally associated with the business of banking. The product offers Bank customers the opportunity to obtain a return of their refunds, structured to accommodate their retirement needs." *Id.*

In light of the OCC's comments on the issue, the court finds that the Retirement CD, despite its risk shifting characteristics, qualifies as a bank deposit under the dictates of the National Banking Act.

b. *Is The Retirement CD Subject To State Regulation*:

Plaintiffs maintain that because the National Banking Act authorizes Blackfeet to sell and market the Retirement CD as a bank deposit, state insurance regulation of the Retirement CD is preempted. Defendant, on the other hand, maintains that even if Blackfeet has the power to issue the Retirement CD as a bank deposit, Florida may nevertheless still treat the

Retirement CD as insurance and subject it to state insurance regulation.

The issue of whether the State of Florida can regulate Blackfeet's sale of the Retirement CD is complex. The issue involves two subsidiary questions: First is whether the State of Florida's regulatory efforts are preempted under traditional preemption principles and the second is whether traditional preemption principles are altered by the McCarran-Ferguson Act. Plaintiffs maintain that because national banks are considered federal instrumentalities, states may neither prohibit nor unduly restrict their activities. In response, defendant argues that the McCarran-Ferguson Act limits the preemptive power of the National Banking Act in this case because it forbids courts from construing the National Banking Act in a manner that impairs Florida's authority to "regulate the business of insurance".

1. *Conventional Preemption*:

The National Banking Act constitutes the paramount authority for the operation of the national banking associations, and, by itself, constitutes a complete system for the establishment and government of national banks. *First Nat'l Bank in Plant City, Fla. v. Dickinson*, 396 U.S. 122 (1969). Nevertheless, national banks are subject to state laws, so long as those state laws do not conflict with the federal law, unduly burden the operations of the banking institution, or interfere with the objectives of the federal system. U.S. Const., Art. VI, cl. 2; *Fidelity Fed. Sav. & Loan Assoc. v. de la Cuesta*, 458 U.S. 141 (1982)(California law that prohibited the inclusion of a due-on-sale clause in loan instruments was preempted by a federal regulation that expressly granted to federal savings and loans the power to include such clauses in loan instruments); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378-79 (1954)(state law which prohibited national banks from advertising services they were authorized to render was preempted by Section 24 (Seventh) of the National Banking Act which provided bank with all "such incidental powers" necessary to carry on the business of banking).

In count I of defendant's administrative show cause order (document 17, exhibit 4), plaintiffs are charged with illegally soliciting the sale of an annuity product to consumers without using agents licensed by the defendant in violation of Section 626.051, Florida Statutes, or using agents affiliated with a financial institution to transact insurance in violation of Section 626.988, Florida Statutes. Count II charges plaintiffs with acting as an insurance company in Florida without first obtaining a certificate of authority in violation of Section 624.401, Florida Statutes, or representing or aiding an unlicensed insurer in violation of Section 626.901, Florida Statutes. Count III charges plaintiffs with mischaracterizing an annuity as a certificate of deposit, by failing to disclose the"precise nature of the premium expense charges and/or administrative charges and/or year by year full surrender charges, by omitting information needed to prevent consumer deception, and by failing to identify an agent licensed in Florida on the application in violation of Section 626.9541(1)(a)1.

As described by plaintiffs, the statutes and regulations that defendant seeks to apply to Blackfeet and ADC fall into four categories. The first, typified by Section 626.988 would make it absolutely unlawful for Blackfeet to accept Retirement CD's from Florida residents.[3] Document 17, exhibit 4. The second category, embodied by section 624.401, would require Blackfeet to qualify as an insurance company before being able to sell the Retirement CD.[4] The third, would require any employee who acts on behalf of Blackfeet in receiving and accepting the Retirement CD to be licensed under Florida's insurance laws, while the fourth category, represented by Section 626.9541(1)(a)1, dictates what disclosures Blackfeet would have to make in marketing the Retirement CD to Florida residents.[5]

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[3] Section 626.988(2) reads in pertinent part:

No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by owned or controlled by, to any degree, directly or indirectly, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

[4] This section provides in pertinent part:

No person shall act as an insurer, and no insurer or its agents, attorneys, subscribers, or representatives shall directly or indirectly transact insurance, in this state accept as authorized by a subsisting certificate of authority issued to the insurer by the department, except as to such transactions as are expressly otherwise provided for in this code.

Among the authority vested upon national banks by congress is the power to receive deposits and exercise all such incidental powers necessary to carry on the business of banking. 12 U.S.C. § 24 (Seventh). As discussed above, the Retirement CD, despite its risk shifting characteristics, qualifies as a bank deposit expressly authorized under the National Banking Act. In this sense, the statutes cited by defendant in the show cause order conflicts with the powers vested to Blackfeet under Section 24 (Third) and (Seventh) of the National Banking Act. Each of the state statutes serves in some manner to prohibit plaintiffs from performing the activities *expressly* provided by Section 24 (Seventh); *i.e.*, receiving bank deposits. (emphasis added); *see First Nat'l Bank of Eastern Arkansas*, 907 F.2d at 777 (finding that National Banking Act, pursuant to conventional preemption principles, preempted Arkansas' authority to prohibit bank from offering debt cancellation contracts because the same was an incidental power to the business of banking). Section 626.988 serves to completely prevent Blackfeet from selling the Retirement CD in Florida.[6] Sections 624.401 and 626.901 require Blackfeet and its employees to obtain a state "insurance license" in order to receive a bank deposit, while section 626.9541(1)(a)1 specifies what disclosures Blackfeet must make in marketing the bank deposit. Because the regulatory statutes defendant seeks to apply create obstacles and unduly interfere with the express authority granted Blackfeet under the National Banking Act to receive deposits, under conventional preemption analysis the state statutes do not apply to Blackfeet's activities surrounding the Retirement CD.

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[5] This section defines unfair methods of competition and unfair or deceptive acts or practices in the advertising of insurance policies as:

> Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, or comparison which. . . [m]isrepresents the benefits, advantages, conditions, or terms of any insurance policy.

2. *McCarran-Ferguson Reverse Preemption*:

Defendant argues that the McCarran-Ferguson Act, Title 15, United States Code, Section 1011 - 1015, exempts the regulatory statutes he alleges plaintiffs have violated from conventional federal preemption. In pertinent part, the McCarran-Ferguson Act reads:

> (a) The business of insurance, and every person engaged therein, shall be subject to the

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[6] As defendant interprets the Florida Insurance Code, the Retirement CD cannot be issued by Blackfeet to a Florida resident except through an agent licensed by the Department of Insurance. However, pursuant to section 626.988, it is unlawful for a licensed agent to work for a national bank.

> laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(a) and (b).

The primary purpose of the McCarran-Ferguson Act is to preserve to the states regulation of the business of insurance. *United States Dep't of Treasury v. Fabe*, —U.S.—, 113 S. Ct. 2202, 2207 (1993)("[s]tate laws enacted for the purpose of regulating the business of insurance do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise"); *Group Life & Health Ins. Co., v. Royal Drug Co.*, 440 U.S. 205 (1979). Although ordinarily a federal law supersedes any conflicting state law, *supra*, the McCarran-Ferguson Act "creates a *reverse-preemption* doctrine for insurance litigation." *Barnett Bank of Marion County v. Gallagher*, 43 F.3d 631, 634 (11th Cir. 1995)(emphasis added); *Fabe*, 113 S.Ct. at 2211.

Plaintiffs, nonetheless, argue that the McCarran-Ferguson Act does not apply to preempt "core banking" powers. They assert that "notwithstanding the sweeping language of the McCarran-Ferguson Act, there are statutes that do not 'specifically relate to the business of insurance' but nevertheless deal with matters of such 'paramount importance' to the national interest that Congress could not conceivably have intended to turn them over to the states." (internal citations omitted). Plaintiffs argue that "Congress did not intend 'the business of insurance' to encompass lawful activities of national banks." *First Nat'l Bank of Eastern Arkansas*, 907 F.2d at 780.

Despite plaintiffs' arguments to the contrary, the activities of national banks are not spared from McCarran-Ferguson reverse-preemption. Although the McCarran-Ferguson Act primarily protects the insurance industry from the operation of antitrust laws, it also preempts other federal statutes that encroach upon a state's regulations of the business of insurance. Thus, under the McCarran-Ferguson Act, if the state law regulates the business of insurance, then *no federal law* may impair it, unless the federal law also regulates the business of insurance or specifically states that it is preempting the particular state law. *Fabe*, 113 S.Ct. at 2208; *Barnett Bank*, 43 F.3d at 634.

For McCarran-Ferguson reverse-preemption to apply several factors must be established. First, the court must inquire whether the Florida statutes in question were established for the purpose of regulating the business of insurance so as to presumptively preempt any contrary federal law. *Id.* Second, the court must determine whether the federal statutes in question, in this case the Title 12, United States Code, Section 24 (Third and Seventh), specifically relate to insurance so as to fit within the McCarran-Ferguson exception that reinstates federal law as supreme.[7] *Id.* Finally, the court must determine whether the activity which brought about the cause of action is the business of insurance within the meaning of the McCarran-Ferguson Act. *Royal Drug Co.*, 440 U.S. at 210; *S.E.C. v. National Sec., Inc.*, 393 U.S. 453, 459 - 60 (1969); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994)("[w]hether a particular activity is part of the 'business of insurance' is, of course, a separate question from whether a state law was 'enacted. . . for the purpose of regulating the business of insurance'").

In determining whether a particular state law was enacted for the purpose of regulating the business of insurance, the Supreme Court has held that the key question is whether the law was enacted to regulate policyholders and their relationship to an insurance company.

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement

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[7] Plaintiffs have not argued that Title 12, United States Code, Section 24 (Third and Seventh) specifically relate to insurance. Accordingly, the court does not address this issue. Notwithstanding, it appears obvious that Section 24 (Third and Seventh) specifically related to the business of banking and not insurance. *See Barnett Bank*, 43 F.3d at 636 - 37 (finding that federal statute allowing national banks to act as insurance agents in town with fewer than 5,000 people did not specifically relate to the business of insurance under McCarran-Ferguson and did not specifically require preemption of Florida's statutory prohibition against bank subsidiaries conducting insurance activities).

> [are] the core of the [regulation] of the business of insurance. Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term was. . . it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance.

S.E.C. v. National Sec., Inc., 393 U.S. at 460.

Those laws that possess the end, intention, or aim of adjusting, managing, or controlling the business of insurance, regulate the business of insurance under the McCarran-Ferguson Act. *Fabe*, 113 S.Ct. at 2210.

The statutes cited by defendant, to the extent that they seek to regulate a financial institution's involvement in *insurance* activity, regulate the business of insurance under the McCarran-Ferguson Act. (emphasis added).[8] Particularly, each of the statutes cited by defendant expresses a concern with overreaching by financial institutions if permitted engage in insurance activity, *i.e.*, selling or marketing *insurance*. *Barnett Bank*, 43 F.3d at 635. Section 626.988 was enacted in response to concerns of coercion and unfair trade practices if banks were permitted to engage in insurance activity. *Id.* Likewise, the unfair trade practice violations cited in the show cause order propose to prevent the deception of insurance consumers in the insurance solicitation process. In this sense, each of the statutes, *to the extent that they curtail Blackfeet's involvement in the business of insurance*, focuses on protecting the relationship between an insurance company and its policyholders and thus regulate the business of insurance as defined by the McCarran-Ferguson Act.

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[8] In *Barnett Bank, supra*, the Eleventh Circuit held that Section 626.988(2), Florida Statutes, regulates the business of insurance within the meaning of the McCarran-Ferguson Act.

3. *Is The Retirement CD Insurance*:

Plaintiffs argue that the Retirement CD is not the business of insurance. For purposes of this motion, the parties have agreed that the Retirement CD should be considered an annuity. Notwithstanding the label attached by the parties, the dispositive issue at this stage is whether the Retirement CD, given its characteristics, qualifies as insurance under the McCarran-Ferguson Act.[9] If the underwriting, sale and marketing of the Retirement CD qualifies as insurance, then Blackfeet and ADC's activities in issuing the Retirement CD is subject to insurance regulation by the State of Florida. If, on the other hand, the same does not qualify as insurance, then the State of Florida can not use its insurance laws to regulate Blackfeet and ADC's activities with respect to the Retirement CD.

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[9] Plaintiffs argue that it "would be grossly anomalous to hold that. . . [the Retirement CD is] not insurance in the banking context. . ." but is for purposes of the McCarran-Ferguson Act. Plaintiffs have misconstrued the issue. The court did not consider whether the Retirement CD was insurance under the banking act. What the court considered was whether the Retirement CD qualified as a bank deposit under the National Banking Act. Whether the Retirement CD also qualifies as insurance under the McCarran-Ferguson Act is a separate issue requiring a separate analysis.

1. *The Business Of Insurance*:

As dispositive of the issue that the Retirement CD is not insurance for purposes of the McCarran-Ferguson Act, plaintiffs cite to the recent Supreme Court decision in *NationsBank supra*. In *NationsBank* the Supreme Court affirmed as reasonable the OCC's determination that for purposes of Title 12, United States Code, Section 92, *supra* fn 9, annuities were properly classified as investments and not insurance. 115 S.Ct. at 814-15. Although persuasive, *NationsBank* is not dispositive of the issue at hand. In *NationsBank* the Supreme Court only affirmed as reasonable the OCC's finding that annuities were investments and not insurance under §92. The issue of whether annuities qualified as insurance under the McCarran-Ferguson Act was never addressed by the Court in *NationsBank*. In fact, the Court, in affirming the Comptroller, resisted the temptation to per se classify annuities as investments and not insurance.

> As our decisions underscore, a characterization fitting in certain contexts may be unsuitable in others.

Id. at 816 *citing Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)("meaning [of words] well may vary to meet the purposes of the law";

courts properly give words "the meaning which the legislature intended [they] should have in each instance").

In support of the argument that the Retirement CD is insurance, defendant cites to the OCC's response letter to John D. Dingell, Chairman of the United States House of Representatives Committee on Energy and Commerce. Congressman Dingell had previously, by letter (document 83, exhibit 1), expressed to the Chairman of both the OCC and the FDIC the concerns of the Committee on Energy and Commerce ("Committee") surrounding the OCC's no objection letter to Blackfeet that the Retirement CD was a bank deposit authorized to be sold directly by national banks under the National Banking Act and that the principle and interest component of the Retirement CD was federally insured. Among the concerns of the Committee was that the OCC did not address whether the underwriting of the Retirement CD by national banks need to comply with state insurance laws and regulations. In response to this concern, the Chairman of the OCC wrote to the Committee:

> While the Retirement CD possesses some of the characteristics of an annuity, as a legal matter our no-objection position is not an authorization for banks to underwrite annuities. In concluding that the Retirement CD represents a bank authorized product, we did not need to address the question of whether the bank is authorized to sell or underwrite annuities, or whether annuities are insurance products.

> Our analysis and conclusion were limited to a determination of the bank's authority to conduct the business of banking under the National Bank Act. State regulatory officials may conclude that the state insurance laws also apply to the Retirement CD or any other activity which we interpret as being authorized by the National Bank Act. Such a conclusion however, does not affect or interpretation of the Act. *A state's insurance laws and the National Bank Act are different laws with different purposes behind them.*

Document 83, exhibit 2 (emphasis added).

The above letter from the OCC demonstrates both that the OCC did not consider the issue of whether the Retirement CD qualified as insurance under the McCarran-Ferguson Act and that from the OCC's standpoint, the possibility existed that the Retirement CD might be subject to state insurance regulation.

During the hearing on the motion from summary judgment, defendant repeated the position that the sale of annuities were the business of insurance because Florida regulates them as insurance. Document 89. Despite Florida's treatment of annuities under the Insurance Code, Section 624.602(1), Florida Statutes, the determination of what constitutes insurance within the meaning of the McCarran-Ferguson Act is a matter of federal law. *S.E.C. v. Variable Annuity Life Ins. Co. ("VALIC")*, 359 U.S. 65, 69 (1959). Inasmuch as the issue is one of federal law, Florida's classification does not control in deciding whether Blackfeet and ADC's activities concerning the

Retirement CD is the business of insurance. *Id.* at 69. Although many aspects of insurance companies are regulated by state law, not all are insurance. *Royal Drug Co.*, 440 U.S. at 230 n. 38 (the sale of a product by an insurance company does not inevitably render the product insurance). The McCarran-Ferguson Act leaves the "business of insurance" and not the "business of insurers" to state regulation. *Id.* at 217.

The Supreme Court has identified certain criteria relevant to determining whether a particular activity--in this case the Retirement CD--is part of the business of insurance. Most important is whether the activity in question has the effect of underwriting or spreading a policyholder's risk. *Royal Drug Co.*, 440 U.S. at 211 ("[i]nsurance is an arrangement for transferring and distributing risk"); *VALIC*, 359 U.S. at 70 - 72. In addressing the issue of whether the Retirement CD is insurance, the Supreme Court has identified the combination of "mortality risk"[10] and the "guarantee payment of a fixed return" to a policyholder as fundamental characteristics of insurance. *VALIC*, 359 U.S. at 71.[11] When the characteristics of the Retirement CD are examined it becomes clear that the

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[10] Mortality risk encompasses the transfer of economic risk of death from the consumer of a product to the issuing company. The legal form of a life annuity involves an agreement by one party (the annuitant) to pay money to another party (the institution) in exchange for a promise to be repaid the contributed amounts plus interest in periodic payments that continue throughout the life of the annuitant. The annuity contract protects the annuitant from the possibility of out living his or her resources. The amount of the periodic payments are determined by the life expectancy of the annuitant pursuant to actuarial calculations. The annuitant risks that death will come before he or she receives annuity payments in the amount he or she expended to purchase the annuity. In guaranteeing periodic

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payments for the lifetime of the annuitant, the issuing entity gambles that the annuitant will die prior to the actuarial predictions and not live so long that the total of the periodic payments will exceed the value of the price received for the annuity.

[11] In *VALIC*, the Supreme Court considered whether a variable annuity was insurance. The insurance companies stressed that because the company assumed the mortality risks associated with the variable annuity, the same was insurance. The Supreme Court, however, found morality risk alone an insufficient basis for concluding that a variable annuity was insurance. According to the Court, insurance "involves some investment risk-taking on the part of the company" and "a guarantee that at least some fraction of the benefits will be payable in fixed amounts." In discussing this aspect of insurance, the Court distinguished the variable annuity from traditional fixed annuity. The court found that generally, the funds underlying the fixed annuity are invested according to conservative standards, and the fixed annuity pays a specified and definite amount to the annuitant in periodic payments. In contrast, the variable annuity's funds are invested primarily in common stocks and other equities, and the variable annuity's periodic payments vary with the success of the company's investment experience. The holder of a variable annuity is not able to depend upon the annuity paying a fixed return. Although there was a mortality risk factor encompassed in the variable annuity in *VALIC*, because the annuity contract offered did not guarantee a fixed return, the court found that the annuity placed all the risk on the annuitant and none on the company and thus there was no true underwriting of risk so as to classify the annuity as insurance.

Retirement CD qualifies as insurance under the McCarran-Ferguson Act. Specifically, the Retirement CD employs the requisite combination of mortality risk and guarantee payment of a fixed return identified by the United States Supreme Court. The mortality risk factor common in both variable and fixed annuities is a characteristic of the Retirement CD. Specifically, the Retirement CD's post-maturity monthly payments to the customer are calculated, in substantial part, on the actuarial prediction of how the customer will live and are guaranteed to the annuitant for his or her lifetime regardless of whether the maturity balance is exhausted; the customer thus hopes to live long enough that the monthly lifetime payments exceed the value of the maturity balance while the bank gambles that the customer will not live long enough to exhaust the maturity balance. Document 83, exhibit 6. There is also a guarantee payment of a fixed return in the sense that the annuitant is guaranteed to receive a specified and definite amount in monthly payments during his or her lifetime. Document 83, exhibit 7. Contributions from the Retirement CD are mingled with Blackfeet's general assets and invested primarily as other debt instruments. Document 89 at 45. Regardless of Blackfeet's investment success, the post-maturity lifetime monthly payments received by the Retirement CD customer remain fixed with a guaranteed rate of interest of at least 3%. Document 83, exhibit 7. Blackfeet thus undertakes the underwriting risk identified in *VALIC* concerning its ability to make a sufficient return on its investments so as to pay the periodic installments it has promised the Retirement CD customer. *Otto v. Variable Annuity Life Ins.*, 814 F.2d 1127, 1133 (7th Cir. 1986).

Because the Retirement CD employs the requisite combination of mortality risk and guarantee payment of fixed return identified by the Supreme Court in *VALIC*, it is an appropriate subject for regulation by the State of Florida as an insurance product.

III. *Conclusion*:

The Retirement CD is a hybrid product with characteristics that qualify it as both an authorized bank product under the National Banking Act and insurance under the McCarran-Ferguson Act. Because the Retirement CD qualifies as insurance under the McCarran-Ferguson Act, defendant's regulation of the Retirement CD is permitted.

Accordingly it is ORDERED:

1. Plaintiffs' motion for summary judgment is DENIED.

2. The parties are directed to notify the court within 10 days of receipt of this order of any issues that remain for the court's consideration.

DONE AND ORDERED this 28th day of August, 1995.

William Stafford
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

Appendix D

Determination of the OCC

Comptroller of the Currency
Administrator of National Banks
Washington, D.C. 20219

May 12, 1994

Blackfeet National Bank
P.O. Box 730
Browning, Montana 59417-0730

Dear Mr. Kelly:

In its November 8, 1993, letter to the Comptroller of the Currency ("OCC") Blackfeet National Bank (the "Bank") advised of its intention to market a new Retirement CD. The Bank has furnished the OCC with information concerning the product. The information includes a description of the product dated May 5, 1994, several legal opinions from outside law firms that address Federal deposit insurance and tax issues related to the product[1] draft promotional materials dated February 26, 1994, and a license agreement between the Bank and American Deposit

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[1] The legal opinions furnished are dated May 2, 1989; January 28, 1991; November 24, 1993; and December 17, 1993.

Corp., dated January 14, 1994. (Collectively this information is referred to herein as the "Information.")

This is to inform you that based on the Information, the OCC has no objection if the Bank proceeds with its plans to market and offer the Retirement CD provided that the program is operated in a safe and sound manner in accordance with the condition set forth below. We express no opinion on the deposit insurance status of the Retirement CD under the Federal Deposit Insurance Act, nor on the tax treatment of the Retirement CD under the Internal Revenue Code. Should it choose to offer the Retirement CD, the OCC expects the Bank accurately to represent the risks and economics of the product, the deposit insurance status and the tax treatment of the Retirement CD in its dealings with actual and prospective customers. A change in the product's structure or terms, or the emergency of safety and soundness concerns associated with either the product or the manner in which the Bank is administering the product, may result in a revocation of our no objection position. In that event, the OCC reserves the right to take any appropriate actions.

I. Summary

The Bank has represented the basic terms of the Retirement CD to be as follows. It will be offered to individuals who will open an account by making a deposit with the Bank. At the time of the initial deposit, the customer will choose a maturity date for the account. During the period before the maturity date, interest will be credited to the account. Each customer will be entitled to select a term of from one to five years during which the interest rate will remain fixed, and after which the rate will fluctuate at the Bank's discretion, in accordance with its cost of funds. Additional deposits can be made up until the maturity date.

On the maturity date the customer will select from various options for repayment. These options will permit the customer to withdraw up to two-thirds of the balance in the customer's account (principal plus accrued interest) on the maturity date. The balance of the account will be distributed to the customer in fixed periodic amounts which will include interest, for the customer's life. The period amounts will be determined with reference to permanent purchase rate guarantees (*e.g.* ,an assumed minimum interest rate of 3 percent at competitive interest rates, and will include a simple refund feature. Under the refund feature, the customer (or his estate or beneficiary) will be guaranteed to receive an amount at least equalling the customer's account balance on the maturity date.

The Bank has represented that it will pay deposit insurance assessments to the Federal Deposit Insurance Corporation (the "FDIC"), as required by 12 U.S.C. 1817, on the total customer account contributions, plus interest which until maturity, accrues on the account. In addition, the Bank has stated that the funds received will be subject to Federal Reserve Board Regulation D, 12 CFR 204, which places reserve requirements on bank deposits. Finally, the Bank has represented that the funds received, plus accrued interest will be recorded on the Bank's general ledger account and accounted for in the same manner as bank deposits, and will be employed to further the Bank's growth and development through lending in the normal course, or through other legally permissible investments.

A discussion of our legal analysis is set forth below, along with guidance on actions and procedures which we believe are appropriate in order for the product to be offered and administered in a manner which is consistent with safe and sound banking practices.

II. Legal Analysis

National banks are expressly authorized to receive deposits and enter into contracts and have broad authorizations to borrow and otherwise fund their operations. Twelve U.S.C. 24(Seventh), which contains a broad grant of authority to national banks, provides in pertinent part that national banks have the power to exercise —

> all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes.

The statutory language and legislative history of §24(Seventh) make clear that the business of banking is not confined to the five enumerated powers. The legislative history of § 24(Seventh) supports a broad reading of the business of banking. See Letter No. 494 (December 20, 1989) reprinted in [1989 - 1990 Transfer Binder] FED. BANKING L. REP. (C.H.) ¶ 83,083 for a full discussion of the statute's legislative history and case law interpretations concerning the scope of the statue. In addition to the authorization to engage in the business of banking set forth in § 24(Seventh), national banks are expressly authorized to enter into contracts under 12 U.S.C. 24(Third).[2]

In construing the nature and scope of permissible banking activities, it is instructive to note that Congress has indicated banks must be afforded flexible alternatives to fund their operations. This belief is implicit in the 1982 repeal of 12 U.S.C. 82, which used to limit national bank borrows.[3] The legislative history of the repeal evidences a clear recognition on the part of Congress that to remain competitive, national banks must be able to fund their operations without unwarranted restraints.

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[2] The United States Supreme Court has confirmed their authority to borrow money. *Wyman v. Wallace,* 201 U.S. 230, 243 (1905).

[3] Pub. L. 97-320, Title IV, § 402, Oct. 15, 1982, 96 STAT. 1510.

> Statutory limitations on the liabilities of national banks have remained essentially unchanged since original enactment of the National Bank Act in 1864. Since that time, however, the nature of the banking business --especially the manner in which banks are funded -- has altered considerably. The rigid limitations of § 82 adversely restrain bank flexibility and competitively disadvantage national banks. Many states have no such statutory restraints upon state-chartered institutions.

Senate Rep. No. 97-536, PL. 97-320, 96 Stat. 1469 (1982) at 60.

In the instant case, the express authorizations for the Bank to receive deposits and enter into contracts, coupled with its powers to incur liabilities and fund its operations, clearly make the Retirement CD an authorized Bank activity. The inherent relationship that the Retirement CD customer has with the Bank is that of depositor or creditor. The customer places funds with the Bank and in turn receives the Bank's promise to repay the amount it has received, plus interest. This promise forms the very basis of the depositor or creditor/bank relationship.

The fact that the product is structured to provide for interest payments keyed in part to the expected life of the depositor does not change the intrinsic nature of the Retirement CD as an authorized bank product. Modernizing bank practices to comport with ever changing customer needs is permissible, provided that the practices remain fundamentally what is authorized by the Act. In addition, utilizing creative funding techniques is a desirable, indeed necessary action for national banks.

In M&M Leasing Corporation v. Seattle-First National Bank, 563 F.2d 1377 (9th Cir. 1977), *cert. denied,* 436 U.S. 956 (1978) ("*M&M Leasing*"), the court addressed the issue of whether a national bank may engage in the leasing of motor vehicles. The court concluded that leasing in effect constitutes a loan of money secured by the leased property and is therefore incidental to the "loaning of money on personal security" which is the fourth express power provided in § 24(Seventh). In reaching its conclusion, the court drew comfort from the fact that "commentators uniformly have recognized that the [Act] did not freeze the practices of national banks in their nineteenth century forms," and added "we believe the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *Id* at 1382.

Similarly, in *American Insurance Association v. Clarke,* 656 F. Supp. 404 (D.D.C. 1987) *aff'd,* 865 F.2d 278 (D.C. Cir. 1988) ("AMBCA") the court upheld the comptroller's determination that a national bank's issuance of standby credit in the form of municipal bond insurance was the "functional equivalent" of the issuance of a letter of credit, which is a permissible banking activity under Section 24(Seventh). The court strongly endorsed the OCC's position that in determining whether the activity in question constitutes part of the business of banking, the Comptroller may "look beyond the label given a certain activity to determine whether or not it is permissible." 655 F. Supp. at 408. Although neither letters of credit nor municipal bond Insurance are specifically enumerated as permissible bank products under the Act, the court recognized that extending credit is a fundamental banking practice that can take a variety of forms, regardless of the label given the activity. The court emphasized that the bank powers analysis should focus on the substance of the transaction in question and not proceed "from a narrow and artificially rigid view of both the business of banking and the statute that governs that business." *Id.* at 408.

A national bank's express powers allow it to design products which augment its traditional bank activities. For example, in *Securities Industry Association v. Clark* 885 F.2d 1034 (2d Cir. 1989), *cert. denied* 110 S.Ct. 1113 (1990) ("*SIA v. Clark*"), a national bank was permitted to sell "pass-through" certificates on the basis that this activity is authorized by the Act because it is "convenient and useful" in connection with the bank's sale of mortgage loans. Unlike in *M&M Leasing*, *AMBCA* and *SIA v. Clark*, however It is not necessary to view the Retirement CD as a product which is "incidental," or "useful " to the Bank or a "functional equivalent" used by the Bank in carrying out the business of banking. The product represents the very essence of banking which is embodied in a bank's express authority to accept deposits and enter into contracts, and authority to incur liabilities and fund its operations.

The instant case is quite distinguishable from *Arnold Tours, Inc v. Camp*, 472 F.2d 427 (1st Cir. 1972) ("*Arnold Tours*") where the court held that a bank should not be permitted to conduct a travel agency business as part of the business of banking.[4] The key to the *Arnold Tours* ruling was the inability of the court to find that the rendering of travel agency services was "germane to the financial operations of the bank in the exercise of its express powers." *Id.* at 433.

A recent decision of the Fifth Circuit Court of Appeals suggests in dicta a narrow interpretation of the "incidental powers" clause, restricting banks to activities "necessary" to carry out the business of banking. *Variable Annuity Life Ins. Co. v. Clarke*, 998 F.2d 1295 (5th Cir. 1993), *reh'g denied,* 13 F.3d 833 (5th Cir. 1994), petition for cert. filed, April 13, 1994

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[4] *Arnold Tours* is the leading case in a line of decisions which have concluded that § 24 (Seventh) grants only five expressly enumerated powers and such incidental powers as are "convenient or useful" for performing those five powers. Taken literally, the wording of this test seems to follow a narrow view of the bank powers clause, however, closer review of these cases shows that the reasoning followed is consistent with the historical, broad interpretation of the business of banking. The OCC rejected a narrow view of the business of banking. For a full discussion of *Arnold Tours* and the OCC's position on the case, *see* OCC Letter No. Letter No. 494 (December 20, 1989) reprinted in [1989-1990 Transfer Binder] FED. BANKING L. REP. (C.H.) ¶ 83,083.

("VALIC"). In our view, this interpretation is seriously flawed. An overriding failing of the opinion was the lack of appropriate deference accorded the views of the agency responsible for interpreting this statute in accordance with *Chevron Inc. v. Natural Resources. Defense Counsel, Inc.*, 467 U.S. 837 (1984). Moreover, the standard articulated in the *VALIC* opinion is contrary to longstanding, well established precedent finding that banks may engage in a far broader range of banking activities that resemble or relate to traditional banking activities so that banks may engage in new forms of conducting the business of banking in response to changing markets and technologies. *See generally*, OCC Letter No. 494 (December 20, 1989) reprinted In [1989-1990 Transfer Binder] FED. BANKING L. REP. (C.H.) ¶ 83,083. The VALIC standard would severely curtail needed and appropriate banking services and may be subject to further review. Notwithstanding the foregoing, we view the instant case as the exercise by the Bank of its express authorizations to receive deposits and enter into contracts, coupled with its powers to incur liabilities and fund its operations.

The Retirement CD is clearly a financial product whose primary attributes are grounded in the Bank's expressly authorized powers. While somewhat novel in its approach to determining interest on deposits funds by providing customers, *inter alia*, with fixed periodic lifetime payment, the Retirement CD nonetheless represents fundamentally a bank authorized product. In recent years, national banks have responded to changing customer needs and market forces by offering a range of innovative bank deposit related instruments. Some deposit instruments have had interest rates tied to various indices such as college tuition costs or stock market performance. In OCC Dec. No. 87-1093, the Comptroller permitted the Chase Manhattan Bank and its affiliate banks to offer a new, non-transferable time deposit account known as the Market Index Investment Deposit Account ("MII"). The MII pays interest at a rate based in part upon changes in the Standard & Poor's 500 Composite Stock Index.[5] The OCC noted that Chase has the express power to offer the MII, and "to pay interest on time deposits according to market conditions, in order to remain competitive with savings alternatives such as money market mutual funds ... based on any index or standard selected by the bank." *Id.* at 4. The decision also approved Chase's purchase of stock index futures to reduce, or hedge," its interest rate exposure. On this latter issue the OCC noted that hedging its exposure —

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[5] On April 21, 1987, the Investment Company Institute brought suit in the U.S. District Court for the District of Columbia against Chase and the OCC seeking to enjoin the bank from offering the MII and directing the OCC to withdraw its approval. The ICI claimed that the MII violated the Glass-Steagall Act, 12 U.S.C. 24(Seventh), 377, 278 and 78, and the Financial Institutions Supervisory Act, 12 U.S.C. 1818(b)(1982) (Civil Action No. 87-1093, D.D.C.). The case is still pending.

> is an integral adjunct to the bank's deposit-taking activity and is incidental to this power and the business of banking under 12 U.S.C. 24(Seventh). The "incidental powers" clause of this section has been flexibly construed by the courts and the OCC in recognition of the fact that the business of banking is continually changing and evolving.[6]

Like the "college-CD" and "Chase indexed CD" which are deposit products intentionally structured to meet specific customer funding needs, the Retirement CD is structured to provide customers with a return on their deposit to meet retirement needs. This structure remains consistent with the express powers of banks to act as deposit takers and to enter into contracts, and with its authorizations to fund its operations and incur liabilities. The creation of new instruments and services under express or incidental banking powers has been permitted over and over again by the OCC. [7]

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[6] *Id.* at 4.

[7] *See, e.g.,* OCC Letter No. 331 (April 4, 1985), reprinted in FED. BANKING L.. REP. (C.H.) ¶ 85,501 (variable annuities); OCC Letter No. 271 (September 21, 1983), reprinted in FED. BANKING L. REP. (C.H.) ¶ 85,435 (real estate loans and equity interests); OCC Letter No. 387 (June 22, 1987) reprinted in FED. BANKING L. REP. (C.H.) ¶ 85,611 (real estate loans); OCC Letter No. 326 (January 17, 1985), reprinted in FED. BANKING L. REP. (C.H.) ¶ 85,498 (options); OCC Letter No. 356 (January 7, 1986), reprinted in FED. BANKING L. REP, (C.H.) ¶ 85,526 (agricultural and metal futures used for hedging); OCC Letter No. 357 (February 26, 1986), reprinted in FED. BANKING L. REP. (C.H.) ¶ 85,527 options on financial instruments and on financial futures);

Moreover, adjustments and refinements of core bank products - designed to accommodate the needs of Bank customers - are clearly permissible as incidental to the business of banking. *Id.*

Over the life of the Retirement CD, the depositor will receive a return of the deposit, plus interest. The timing of these receipts calls for up to two-thirds of the maturity balance to be distributed to the depositor at maturity, leaving the remainder as an undistributed maturity balance. The undistributed maturity balance plus an interest factor calculated on the maturity date, is disbursed in the form of lifetime periodic amounts. Should the depositor continue to live after he has received a return of the maturity balance through the periodic amounts, he will continue to receive distributions. These additional distributions represent nothing more than additional interest paid over the life of the Retirement CD. Viewed properly as a single financial product over the full life of the Retirement CD, from initial deposit until final periodic lifetime payment, the total return on the deposited amounts is represented by the sum of (i) interest accrued until maturity (ii) the portion of the periodic amounts which is allocable to interest, plus (iii) those periodic amounts, if any, that are received by the depositor after he has received a return of the maturity balance.

OCC Letter No. 365 (August 1, 1986), reprinted in FED. BANKING L REP. (C.H.) ¶ 85,535 (financial futures).

The Retirement CD also contains attributes of a bank liability utilized in the ordinary course of the Bank's business to fund its operations. The form of the liability is a financial instrument sold to customer which contains the characteristics of an ordinary deposit combined with other permissible financial attributes. The timing and calculation of the market return is based in part on the life expectancy of the customer, as calculated at the product's maturity. Simply stated, as with any financial liability, the Retirement CD involves no more than the receipt of customer funds by the Bank in exchange for the payment of a market return to the customer. This flexible form of financing is within the Bank's authorized power to fund its activities through borrowings.

The Bank's Retirement CD simply allows the Bank to offer to its customers, in combination with its other banking related products, the traditional financial advantages normally associated with the business of banking. The product offers Bank customers the opportunity to obtain a return on their funds, structured to accommodate their retirement needs. Market restraints will require that the rate of return on the Retirement CD, when considered in light of the payout structure, is competitive with the market rates of return for other similar financial products, such as traditional bank deposit accounts, bank borrows, and bank securities offerings. The Retirement CD is a logical outgrowth of the Bank's business mandate which, as with any bank, is to offer its customers competitive and innovative financial products. Through the product, the Bank will be able potentially to reach additional customers and offer current customers an enhanced array of bank products.

The Retirement CD is a natural response to customer demands that their banks offer more diversified alternatives from which they may choose to place their funds. As noted above, bank deposit products already exist to help customers fund college tuition costs and obtain returns competitive with the stock market. Much like the proliferation of IRA accounts and other related deferred compensation products, the Retirement CD is merely a reaction by the Bank as part of its business to create a specially structured bank product intended to meet customer financial needs, with an emphasis on those related to retirement.

Whether the product is characterized as a deposit account, financial contract, bank borrowing or other type of bank product, it remains a financial product which may be offered by the Bank as part of the business of banking. Simply combining activities that fall under the Bank's express and other authority does not affect the underlying ability of the Bank to engage In these activities. In summary, the OCC finds offering the Retirement CD to be authorized under the express powers granted the Bank to receive deposits and enter into contracts, coupled with its powers to incur liabilities, and fund its operations in conducting the business of banking.

III. Conditions

The OCC has no objection to the Bank proceeding with its plans to market and offer the Retirement CD, provided that the Bank complies with the following conditions requisite to the safe and sound operation of this program.

1. The Bank should take appropriate steps to deal with the risks it will undertake in connection with the Retirement CD. In particular, we note that the Bank assumes the risk of paying interest throughout the life of each depositor even in situations where the maturity balance becomes exhausted. The Bank's business plan should indicate in detail how it plans to mitigate this risk as well as the other risks, and consideration should be given to purchasing commercially available annuities from insurance companies to fund the Bank's payment obligations.

2. The Bank should plan for the impact that fluctuations in interest rates will have on its interest rate spread. We note that the product contains an initial fixed rate period of from one to five years, after which the interest rate can be adjusted in accordance with the Bank's cost of funds, but not below a floor of 3 percent. A significant decline in interest rates could reduce or eliminate any spread between the interest rate payable on this product and the interest received on corresponding assets.

3. The Bank must adequately manage its funding sources for the Retirement CD, considering the financial risks associated with the product. The Bank should avoid inadequate matching of funding sources which could result in the unplanned sale of investments in managing interest rate or liquidity risk. This could result in the reclassification of investments as held for sale, the required use of market value accounting and a concomitant decrease in the Bank's capital.

4. The Bank's board of directors should take steps to assure that appropriate accounting standards are followed. Selection of an accounting firm with substantial expertise in the accounting issues associated with the product will be particularly important. We note that the need for specialized accounting expertise has been recognized in the past by the Bank in situations where it has utilized the services of a major accounting firm for specialized reviews.

5. The design and implementation of adequate product controls and systems will be necessary to enable the Bank to mitigate the risks associated with the product. In particular, we note the importance of adequate planning for the use of funds generated from the product; accurate estimation of product payouts; and proper design of internal controls.

6. The Bank should take all necessary steps to assure that representations to customers concerning the FDIC insured status of the Retirement CD are fair

and accurate, and that any limitations on the insurance status of the product are conspicuously indicated. In this regard, the Bank should obtain an opinion from the FDIC that it will treat the Retirement CD as an insured product before representing that this product is so insured.

7. We call your attention to the Interagency Statement on Retail Sales of Nondeposit Investment products, NR 94-21 (February 17, 1994), which contains guidelines for insured depository institutions engaged in the sale of nondeposit investment products, including mutual funds and annuities. In the event the FDIC determines that all or a portion of the Retirement CD is not covered by FDIC insurance, the guidance provided in the Interagency Statement with regard to nondeposit investment products should be followed in structuring suitable Bank policies and procedures with respect to the manner in which the product is offered and sold to customers.

8. Use of the term "guaranteed as applied to the Retirement CD may be misleading, and may cause customers to confuse the "guarantee" with FDIC insurance. Some phrases as are currently included in the Bank's promotional materials, such as "bank guaranteed monthly payments for life" may be misconstrued by the public as a FDIC guarantee, especially when the term guarantee" precedes or follows statements about FDIC insurance. In addition, the claim that the CD is "guaranteed" by the Bank is redundant since the Bank is the obligor on the

instrument meaning, that the Bank's guaranteed does not accord the customer any further rights or impose on the Bank any additional obligations. Thus, we strongly urge against use of the term "guaranteed" in promotional materials.

9. The Bank should carefully review representations it plans to make concerning the tax treatment of the Retirement CD to customers. In the event the Bank plans to proceed without obtaining a revenue ruling from the Internal Revenue Service, it should assure its disclosure materials fully inform customers of the risks associated with the Bank's tax position. The distinction between an opinion of counsel and a revenue ruling should also be clearly disclosed.

10. If an early withdrawal by a customer will result in a substantial negative tax impact, this information should be prominently displayed In the Bank's promotional materials. In addition, the promotional materials should contain a full explanation of the tax impact a prepayment could have if forced on customers by the FDIC acting as receiver or conservator for the Bank and if customers elect not to utilize a rollover option.

11. We note the applicability of the requirements imposed by 12 U.S.C. 4301 *et seq*. and 12 CFR 230 *et seq*. ("Truth in Savings") which mandate among other elements, disclosure that the product's interest rate and annual percentage yield *("*APY*")* may change; the method used to determine the interest

rate; the frequency with which the interest rate may change; and limits, if any, on the amount the interest rate may change. 12 CFR 230.4(b)(l)(ii). Additional disclosures are required concerning the penalty for early withdrawal, including that a penalty will or may be imposed for early withdrawal, how it is calculated, and the conditions for its assessment. 12 CFR 230.4(b)(6)(ii). We note that the cover letter in the draft promotional materials includes a statement that there are substantial penalties for early withdrawal, as well as a reference to a more detailed explanation of the penalties elsewhere in the materials. However, we believe that the disclosure of the existence of these penalties should be more prominently displayed.

12. As a result of the inherent complexities present with the product, we are particularly concerned that the Bank clearly disclose to prospective and actual customers the product's mechanics and economics. In particular, the promotional materials should clearly explain the way in which the refund feature is calculated. The materials should specifically note that if a depositor dies before receiving distributions equal to the maturity balance, the depositor and his beneficiaries will receive the difference between the maturity balance and the payments received to date. In effect, if this happens, the depositor will not receive any interest on the maturity balance during the payment phase. The impact of this feature we believe is significant enough to warrant conspicuous disclosure on the cover page of the promotional materials. We believe additional

disclosures should clearly explain that the periodic lifetime payment amount will be computed on maturity, and will remain fixed throughout the remainder of the customer's life; that the amount in the customer's account at maturity is the dollar amount used for computing the amount of periodic withdrawals; and the manner in which the periodic amounts are determined including how the applicable interest rate is selected.

13. A significant risk associated with the Retirement CD stems from the fact that once the fixed interest rate period expires, the Bank may, in accordance with its cost of funds, adjust the interest rate (but not below the minimum rate) as often as it wishes. This feature of the product may be especially susceptible to confusion on the part of depositors familiar with traditional deposit products. The Bank should take appropriate steps to ensure that customers understand this feature. The risks associated with this feature are significant enough to justify disclosure on the cover page of the promotional materials and elsewhere as appropriate.

14. We note that the Bank expects that most if not all deposits taken under the Retirement CD will come through the mail from depositors located throughout the U.S.A. However, to the extent the Bank engages in sales on its premises, we believe that the unique features of this product requiring disclosure would make it unsuitable for sales in the routine deposit-taking area, such as the teller window. The

Bank should arrange for customers to be referred to individuals who are specifically designated and trained to assist customers interested in making a deposit under the Retirement CD. This approach would enable the Bank to ensure that customer questions are answered by personnel who are well-acquainted with the complexities associated with this product.

15. The Bank should implement an appropriate training program for personnel who will be involved in marketing the Retirement CD. The program could be structured to ensure a thorough understanding of the product so that customer questions can be answered properly, and investment risks conveyed adequately.

16. The Bank's training and compensation systems far the product should include safeguards that encourage employees to recommend the Retirement CD only in situations where there are reasonable grounds for believing that the CD is suitable for the particular customer on the basis of information disclosed by the customer. Before making recommendations, employees should make reasonable efforts to obtain tax status, investment objectives, and other information that may be useful, reasonable or necessary to enable the employee to conclude whether the CD is suitable for that customer.

17. The Bank should develop and implement policies and procedures to ensure that its marketing efforts associated with the Retirement CD are in compliance with applicable laws and regulations, safety and soundness, the Bank's internal policies and

procedures, and principles set forth in this letter. The Bank should also provide for a system to monitor customer complaints and their resolution.

You have furnished us with a copy of the Licensing Agreement that was entered into between the Bank and American Deposit Corp., on January 14, 1994 (the "Agreement"). We understand that this Agreement grants the Bank a nonexclusive license to market and sell the Retirement CD throughout the world. The license does not include, however, the right to subcontract or sublicense the marketing and sale of the product, *e.g.*, to another bank. Please be advised that the OCC takes no position on the ability of American Deposit Corp. to license this product, or on the proprietary nature of the Retirement CD as it pertains to American Deposit Corp. Moreover, we take no position on whether the Bank or any other depository institution could structure its own CD with attributes similar to those of the product without entering into the Agreement.

If you have any questions on the foregoing, or need any additional information, please feel free to contact the undersigned or Eugene H. Cantor, Senior Attorney, at 202-874-5202.

William P. Bowden, Jr., Chief Counsel

Appendix E

Determination of the FDIC

FDIC
Federal Deposit Insurance Corporation
Washington, D.C. 20429
May 12, 1994

American Deposit Corp.
c/o Dennis M. Gingold
Anderson, Aukamp & Gingold
1250 Twenty-Fourth Street, N.W.
Suite 700
Washington, D.C. 20037

Dear Mr. Gingold:

This is in response to your letter of April 19th and our meeting of April 26, 1994 concerning the "Retirement CD," a new product which has been developed by American Deposit Corp. ("ADC"). The Retirement CD combines features of a traditional certificate of deposit together with certain payment terms and tax advantages of an annuity contract. Initially, the Retirement CD is being offered by a single bank, Blackfeet National Bank of Browning, Montana, under a licensing agreement with American Deposit Corp. However, if the product is successful, it may be licensed to other FDIC insured depository institutions.

Your letter, as well as certain news reports, raise the question of whether the Retirement CD product is a deposit entitled to FDIC insurance and, if so, the extent of such insurance. The Office of the Comptroller of the Currency has also asked us to look into the insurability of this product. Toward this end, we have reviewed the promotional information, Account Terms and Conditions, Account Request Form, and other pertinent information concerning the product offering which you provided with your letter and during our meeting, along with an advertisement placed by Blackfeet in the February 15, 1994 Wall Street Journal.

It is our understanding that Blackfeet's Retirement CD would function along the following lines. Customers may open a Retirement CD account with a minimum initial deposit of $5,000. Subsequent deposits of not less than $1,000 may be made once a year. When the account is opened, the customer chooses a date ("Maturity Date") when the CD will mature, but the minimum term of the account must be at least one year. Upon opening the account, the customer also chooses his/her payout options. Customers may choose to receive up to two-thirds of the account balance (principal plus accrued interest) in a lump sum at maturity. Any amount which the customer elects not to receive in a lump sum at maturity will be used as the basis for the calculation of equal monthly payments which will be made for the remainder of the customer's life (or, in the case of a joint account, the survivor's life). Customers may change their payout option at any time up to thirty days prior to the Maturity Date. Unscheduled withdrawals prior to the Maturity Date will incur substantial penalties, unless they are due to the death or disability of the customer. Shortly after opening the account, customers will be mailed a "certificate of deposit." It is our understanding that the bank will record these funds on the bank's books as deposit liabilities, pay deposit insurance assessments on them, and use them in the normal course of its business. Insofar as the Retirement CD is being characterized as an annuity for income tax purposes, income taxes reportedly are deferred until the time of withdrawal. The period of time from the customer's purchase of the Retirement CD up until the Maturity Date is referred to as the accumulation phase. The period of time after the Maturity Date is referred to as the payout phase.

Due to the tax features of this account, it is reasonable to expect that many, if not most, customers will choose a Maturity Date which coincides with their retirement. The Retirement CD pays a fixed rate of interest for up to the first five years, after which time the interest rate is adjusted at the bank's sole discretion without reference to any independent index. However, the issuing bank contracts that the interest rate will never fall below three per cent per year. Interest ceases being posted to the customer's account upon maturity. However, the bank utilizes an "imputed interest rate" during the payout phase to calculate the monthly benefit which the customer will receive. If the account owner dies prior to the

Maturity Date, his/her beneficiary will receive the principal and all accumulated interest. If the account owner dies after the Maturity Date, the beneficiary will receive the principal and all accumulated interest up until the Maturity Date, less any lump sum distribution and monthly payments which have been made. The bank will charge a one time set-up fee of $100 when the account is opened.

Interest (in the traditional sense) ceases being posted to the customer's account at maturity, while the bank utilizes an "imputed interest rate" during the payout phase. Thus, the value of a customer's account after the Maturity Date which is payable to a beneficiary upon the customer's death would be equal to all principal plus accrued interest earned up until maturity minus any lump sum distribution and monthly benefit payments. However, the "expected value" of the monthly benefit payments which the bank has contracted to make would generally be greater than the amount payable to a beneficiary because of the imputed interest which the bank uses to calculate the expected monthly benefit stream.

In reviewing the Retirement CD, the FDIC has considered (1) whether the Retirement CD is a deposit, as that term is defined in section 3(l) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. 1813(l); (2) if so, the extent to which the Retirement CD is covered by FDIC deposit insurance; and (3) the adequacy of disclosures to customers made in the issuing bank's promotional materials and advertisements concerning the extent of FDIC insurance.

Section 3(l) of the FDI Act, in relevant part, defines a "deposit" as:

> the unpaid balance of money or its equivalent received or held by a bank ... in the usual course of business and for which it is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or which is evidenced by a certificate of deposit . . . .

12 U.S.C. 1813(l).

Not all liabilities of a bank are deposits for the purposes of the FDI Act. Whether a particular liability comes within the definition is a question that turns upon all of the facts and the intent of the parties.

The first requirement is that there must be an "unpaid balance of money or its equivalent." For example, if a bank is holding real estate or some other non-monetary asset, this requirement would not be satisfied. In the case of a Retirement CD, however, the bank's obligation will be funded with cash or an instrument ordering the transfer of cash funds and thus the CD clearly represents "the unpaid balance of money or its equivalent."

Second, customer funds used to purchase Retirement CDs apparently will be received and held by the bank in the usual course of its business. There is no indication that the funds will be received or held by a holding company, any subsidiary or affiliate of the bank, or by any unrelated party. The bank intends to solicit the funds from retail customers, as it solicits other types of deposits.

Third, in this case, the bank will be giving credit for the funds received to an account established for the customer which will be evidenced by a "certificate of deposit," which the bank has indicated it would issue to each customer, Although the customer may have limited rights to withdraw the funds, the bank will nonetheless be obligated to repay all principal and interest accrued up to the Maturity Date to the customer (or if the customer dies prior to full repayment, to his estate or designated beneficiary) [1]

In addition, in order for there to be a "deposit" the parties generally have to intend to create a deposit liability. In most cases, the parties evidence their intent by including language in the pertinent agreements indicating whether or not a particular liability of the bank is intended to be a deposit liability as opposed to some other type of general obligation of the bank. If the parties intend to create a non-deposit liability, such as a bank note or other subordinated liability, then generally a deposit is not created (although the intent of the parties is not always determinative since it is only one factor that is considered).

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[1] Once a Retirement CD matures, the customer does not have the option of receiving all principal and interest in one lump sum. At a minimum, one-third of the account balance can only be paid to the customer in monthly installments over the remainder of the customer's life, similar to an annuity. Thus, the CD appears to be a hybrid. It possesses certain features which are characteristic of a deposit, while other features resemble an annuity.

Based on the foregoing and subject to the limitations discussed in the succeeding paragraph, we have concluded that the Retirement CD is a "deposit," within the meaning of section 3(l) of the FDI Act, because: (1) there is an unpaid balance of money or its equivalent received and held by the bank in the usual course of business; (2) the bank will utilize the funds received in the normal course of its banking business (*e.g.*, to make loans or investments); (3) the bank will give credit for the funds received to an account evidenced by a certificate of deposit; (4) the parties intend to create a deposit liability, as evidenced by language expressing such intent in the Account Terms and Conditions, Account Request Form and other promotional material provided to us; (5) in the event of the account holder's death, the bank will pay an amount equal to all remaining principal and interest in the account to the customer's beneficiary; and (6) we understand that the bank intends to treat the Retirement CD like any other deposit liability, including booking it as a deposit for accounting purposes, paying deposit insurance assessments on it and maintaining the necessary reserves pursuant to regulations promulgated by the Board of Governors of the Federal Reserve System.

With regard to the extent of FDIC insurance, we have concluded that a Retirement CD will be insured for the same amount (up to a maximum of $100,000) that would be payable to an account holder's beneficiary in the event of the account holder's death. That is, in the event the issuing bank were to fail prior to the Maturity Date, a Retirement CD would be insured to the same extent as any other type of CD, *i.e.*, for principal and accrued interest up to the date of failure. In the event that the bank were to fail after the Maturity Date, the FDIC would pay a customer the balance of the account at the Maturity Date (principal plus accrued interest) minus any lump sum distribution and any monthly payments, up to a maximum of $100,000. We also point out that a Retirement CD would not be insured separately from any other individual or joint accounts, as the case may be, which the depositor(s) may maintain at the same insured depository institution. Under no circumstances would FDIC insurance extend to the bank's commitment to make lifetime payments, as the value of such payments is uncertain and may exceed the total account balance.[2] The FDIC is aware that the insured amount would generally be less than the expected value of the monthly payments which the bank agrees to make. However, as we noted previously, the FDI Act § 3(l) definition of "deposit" contemplates a sum of money being held by the bank on behalf of a depositor for which the bank is obligated to give credit. The expected value of the contractually agreed-to monthly payments does not reflect an account balance, *i.e.*, principal deposited by the customer plus accrued interest posted to the customer's account. Instead, the expected value (which you have represented as being an ascertainable number) is derived from the total value of the expected monthly payments. However, it is not reflected in any account statement which is made available to the customer. In fact, subsequent to the Maturity Date, the bank no longer produces Retirement CD account statements. From that point in time on, the customer receives only his/her monthly check and a IRS Form 1099R.

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[2] We note that the FDIC's conclusion with regard to the extent of deposit insurance to be afforded a Retirement CD is in accord with a written legal opinion you provided to us issued by a private law firm at your request.

You should be aware that the manner in which an insured depository institution advertises its deposits is subject to the proscriptions of Federal Reserve Board Regulation DD, Truth in Savings, 12 CFR Part 230, and section 709 of the United States criminal code, 18 U.S.C. 709. More specifically, section 230.8(a) of Regulation DD provides that "[an advertisement shall not be misleading or inaccurate and shall not misrepresent a depository institution's deposit contract." 12CFR § 230.8(a).[3] 18 U.S.C. 709, a criminal statute, provides that it shall be unlawful for anyone to "falsely [advertise] or otherwise [represent] by any device whatsoever the extent to which or the manner in which the deposit liabilities of an insured bank or banks are insured by the Federal Deposit Insurance Corporation ...."

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[3] Section 230.8 also prescribes specific disclosures in advertisements which solicit deposits concerning the terms and rates that are being offered.

The FDIC is extremely concerned that customers understand what is and is not covered by FDIC insurance. A recent survey has shown that many customers who purchase mutual funds on bank premises are under the erroneous impression that those investments are insured by the FDIC. The federal financial institution regulatory agencies' concern about depositors understanding exactly what is and is not insured is reflected in the recently issued "Interagency Statement On Retail Sales Of Nondeposit Investment Products."

The FDIC therefore strongly believes that all promotional materials, advertisements, agreements and other customer materials concerning the Retirement CD should clearly and conspicuously state that the lifetime monthly annuity payments are not guaranteed by the FDIC. The bank should also exercise care that the relative size of typefaces used in promotional materials as well as the juxtaposition of statements could not, in any way, be reasonably expected to create a deceptive and/or misleading impression.

The FDIC has examined the Retirement CD promotional materials, Account Terms and Conditions and Account Request Form, you provided to us. The FDIC is concerned that consumers who may choose to open such an account with the bank may be mislead with regard to the extent of FDIC insurance for such an account. For example, the bank's sample cover letter to a prospective depositor states that "[o]nce your account matures, you are guaranteed by the bank to receive a monthly payment for the remainder of your life." (Emphasis in original). One sentence later, that paragraph continues by stating "Please note, FDIC insurance relates only to the account balance and accrued interest." Shortly thereafter, however, the letter asserts that "[i]f you are looking for ... a guaranteed return and federal insurance ... then you should seriously consider a Retirement CD." (Emphasis in original). We remain concerned that the proviso concerning the extent of FDIC insurance is inaccurate and that the juxtaposition of these two statements could mislead a consumer. We suggest that the proviso berevised to read "Please note, FDIC insurance relates only to the principal (the amount you contributed) plus interest accrued to maturity.

Similarly, the bank's one-page fact sheet states that "Blackfeet's Retirement CD is the first and only retirement account to combine lifetime benefits, long-term tax-deferral, FDIC insurance and flexibility." It also states that "FDIC insurance makes the Retirement CD as safe as your savings account... . " The bold-face caption immediately above this statement reads "Federally insured up to $100,000." The paragraph immediately below this one is captioned "Your payments are guaranteed for life." The paragraph states that "[o]nce your account reaches maturity, the bank guarantees monthly payments for the rest of your life." In this case, the bank is analogizing its Retirement CD to a simple savings account in terms of safety. Such is not the case. A customer's savings account is fully insured by the FDIC up to a maximum of $100,000 such that if the bank were to fail that customer would receive the full value of the customer's account (principal plus accrued interest) up to the $100,000 maximum. However, in the case of a Retirement CD, if the bank were to fail after the Maturity Date and at a point in time where the customer had already been paid the full value of the account through a lump sum distribution and monthly payments, the FDIC would neither insure nor continue to pay those monthly payments for the rest of the customer's life. Once again, we are concerned that the above-noted representations may be misleading. The bank's February 15, 1994 advertisement in the Wall Street Journal raises similar concerns to those expressed above. Any time the bank chooses to stress FDIC insurance and guaranteed payments for life, consumers can reasonably be expected to assume that FDIC insurance covers the lifetime monthly payments.

The FDIC is also concerned about Blackfeet's explanation of deposit insurance in the Account Terms and Conditions. The text states that "[tlhe deposits of each depositor are insured by the Federal Depo5it Insurance Corporation for up to an aggregate amount of one hundred thousand dollars ($100,000)."

However, once again, this document does not make it clear to customers that under no circumstances will the FDIC be responsible for continuing to pay monthly benefits during the payout phase. This section of the Account Terms and Conditions 9065 on to state that "[f]or insurance purposes, jointly owned accounts are considered to be held by one depositor." We consider this statement to be misleading. Pursuant to § 330.7 of the Corporation's deposit insurance rules and regulations (12 CFR 330.7), joint accounts are aggregated with other joint accounts and insured separately from individual accounts.

Section 230.8(c) of Regulation DD provides that if an annual percentage yield is stated in an advertisement for a time deposit, the advertisement shall clearly and conspicuously include a statement that a penalty will or may be imposed for early withdrawal. We note that the bank's one page fact sheet which states the annual percentage yield for a three and five year initial term Retirement CD at the bottom includes no such required disclosure. The FDIC is concerned that potential customers be made aware of the substantial penalties for early withdrawal from a Retirement CD in circumstances other than death and disability.

We also call your attention to the aforementioned "Interagency Statement on Retail Sales of Nondeposit Investment Products" which sets forth guidelines that insured depository institutions should follow when selling nondeposit investment products, such as mutual funds and annuities, to retail customers. While we have concluded that the Retirement CD is an insured deposit, with some limitations, it nonetheless also possesses certain characteristics which make it quite similar to an annuity. We think that some of the same concerns discussed in the Interagency Statement with regard to nondeposit investment products may be applicable to the Retirement CD.

Insured depository institutions offering the Retirement CD product should also keep in mind that the FDIC's brokered deposit regulation (12 CFR 337.6) may be applicable under certain circumstances.

We are unable to comment concerning the question of how a Retirement CD would be treated in a bank failure that is resolved via the use of a purchase and assumption transaction. The precise nature of these transactions differs on a case-by-case basis.

Finally, the issue of the safety and soundness of any bank's participation in offering the Retirement CD will be subject to review by the appropriate regulators and the FDIC as back-up supervisor. The FDIC may have substantive concerns with regard to how a bank manages funds received in this program. Where the issuing bank is an insured state nonmember bank and thus within the FDIC's supervisory jurisdiction, these issues should be discussed with the FDIC's Division of Supervision. The FDIC's Legal Division takes no position with regard to any safety and soundness concerns which may be raised by the Retirement CD product. Similarly, the Legal Division is not expressing any opinion with regard to the tax status of the Retirement CD. Our opinion relates solely to the insured status of the Retirement CD and is based upon the facts as we understand them as outlined above. Different facts or circumstances may alter our opinion.

Our willingness to respond to your request for an opinion as to the insurability of the Retirement CD product should in no way be represented or construed as an endorsement or approval by the FDIC of the product. To the contrary, the FDIC expressly disclaims any such endorsement or approval.

If you have any questions concerning this letter, please feel free to contact Claude A. Rollin, Senior Counsel, or Jeffrey M. Kopchik, Counsel, at (202) 898-3985 or (202) 898-3872, respectively.

Very truly yours,

Douglas H. Jones
Acting General Counsel

cc: Jack Kelly, President
Blackfeet National Bank

Appendix F

Excerpts From the National Bank Act, 12 U.S.C. Chapter 2

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * *

Third. To make contracts.

* * * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title....

§ 484. Limitation on visitorial powers

(a) No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the Courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

(b) Notwithstanding subparagraph (A), lawfully authorized State auditors and examiners may, at reasonable times and upon reasonable notice to a bank, review its records solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws.

Appendix G

Excerpts From the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 et seq.

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, that after June 30, 1948, [the Sherman, Clayton, and FTC Acts] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.